Supreme Court, U.S.
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No. _____

In The

Supreme Court of The United States

October Term 1997

BEVERLY HEALTH AND REHABILITATION SERVICES, INC., et al.

Petitioners,

v.

GERALD KOBELL, Regional Director for Region Six of the National Labor Relations Board for and on behalf of THE NATIONAL LABOR RELATIONS BOARD

Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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113 pp

QUESTIONS PRESENTED FOR REVIEW

1. A. Whether the legal standard that governs the issuance of an injunction under Section 10(j) of the National Labor Relations Act ("NLRA") should be the four-part test employed by the Courts of Appeals for the First, Second, Seventh and Ninth Circuits or the two-pronged approach used by the Third, Fifth, Sixth, Tenth and Eleventh Circuits.

   B. If this Court were to adopt the Third Circuit's two-pronged test for Section 10(j) cases, may a district court issue an injunction without first examining whether the National Labor Relations Board's legal theory violates the plain language of the NLRA.

2. Whether the two-pronged test that the Court of Appeals for the Third Circuit has created for analyzing injunction requests under Section 10(j) contradicts the Supreme Court's decisions in Weinberger v. Romero-Barcelo, 456 U.S. 305, 102 S. Ct. 1798 (1982) and Hecht Co. v. Bowles, 321 U.S. 321, 64 S. Ct. 587 (1944), which hold that federal courts must apply traditional equitable criteria when any moving party seeks an injunction under the authority of a federal statute, unless clear statutory language provides a different standard.

3. Whether a union that gives a health care institution a ten-day strike notice, as required by Section 8(g) of

the NLRA, may later unilaterally extend its strike notice by up to three days despite Section 8(g)'s unambiguous requirement that "[t]he notice, once given, may be extended by the written agreement of both parties."

LIST OF PARTIES TO PROCEEDINGS IN THE COURT OF APPEALS

The Petitioners in this case are Beverly Health and Rehabilitation Services, Inc. (BHRS), Beverly Enterprises-Pennsylvania, Inc. (BE-P) and 20 individual nursing homes in Pennsylvania that are owned and/or operated by either BHRS or BE-P. These twenty individual nursing homes are Beverly Manor of Monroeville, Clarion Care Center, Fayette Health Care Center, Grandview Care Center, Haida Manor, Meadville Care Center, Meyersdale Manor, Mt. Lebanon Manor Convalescent Center, Murray Manor, Richland Manor, William Penn Nursing Center, Beverly Manor of Reading, Beverly Manor of Lancaster, Blue Ridge Haven Convalescent Center West, Caledonia Manor, Camp Hill Care Center, Carpenter Care Center, Stroud Manor, and York Terrace Nursing Center.

Petitioners are subsidiaries of Beverly Enterprises, Inc., which is traded publicly on the New York Stock Exchange. Petitioners are not related to any other publicly-held or publicly-traded companies. Aside from the Respondent listed in the caption of this case, no other parties appeared below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF THE PARTIES ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

DECISIONS BELOW xi

JURISDICTION xii

STATEMENT OF THE CASE 1

I. THIS COURT NEEDS TO RESOLVE THE DEEP SPLIT OF AUTHORITY AMONG THE COURTS OF APPEALS REGARDING THE STANDARD THAT DISTRICT COURTS MUST APPLY IN INJUNCTION PROCEEDINGS UNDER SECTION 10(j). 6

II. THE EXISTING SPLIT OF AUTHORITY AMONG THE CIRCUITS POSES AN IMPORTANT QUESTION REGARDING THE POWER OF FEDERAL COURTS TO GRANT OR WITHHOLD EQUITABLE RELIEF FOR ALLEGED VIOLATIONS OF THE NLRA. 9

III. THE CREATION OF A TWO-PRONGED TEST FOR SECTION 10(j) PROCEEDINGS CONTRADICTS THIS COURT'S HOLDINGS IN ROMERO-BARCELO AND HECHT CO. 14

IV. THE BOARD'S LEGAL THEORY IN THIS CASE IS GROUNDLESS, AND THE BOARD IS NOT LIKELY TO PREVAIL ON THE MERITS OF ITS CLAIM. 19

CONCLUSION 29

APPENDICES

TABLE OF AUTHORITIES

PAGE

CASES

Aguayo v. Tomco Carburetor Co.,
853 F.2d 744 (9th Cir. 1988) 17

American Ship Bldg. Co. v. NLRB,
380 U.S. 300, 85 S. Ct. 955 (1965) 13

Angle v. Sacks,
382 F.2d 655, (10th Cir. 1967) 7

Asseo v. Pan American Grain Co., Inc.,
805 F.2d 23 (1st Cir. 1986) 10

Bailey v. U.S.,
516 U.S. 137, 116 S. Ct. 501 (1995) 22

Beverly Enterprises-Pennsylvania Inc. v.
District 1199P Service Employees International
Union, AFL-CIO,
Case No. 96CV00064j (W.D. Pa. 1997)
(unpublished), affirmed 141 F.3d 1153
(Table) (3d Cir. 1998) iii

Bio-Medical Applications of New Orleans, Inc.,
240 NLRB 432 (1979) 19, 21, 22, 23, 26

Boire v. Freight Carriers, Inc.,
515 F.2d 1185 (5th Cir. 1975) 7

Chevron U.S.A. v. Natural Resources
Defense Council, Inc.,
467 U.S. 837, 104 S. Ct. 2778 (1984) 19

Cohen v. Bd. of Trustees of Univ. of Medicine,
867 F.2d 1455 (3rd Cir. 1989) xii
Colgate-Palmolive-Peet Co. v. NLRB,
338 U.S. 355, 70 S. Ct. 166 (1949) 19
D'Amico v. U.S. Service Industries, Inc.,
867 F. Supp. 1075, 1082-1085
(D. D.C. 1994) 7, 9, 17
Dowd v. Intern. Longshoremen's Ass'n, AFL-CIO,
975 F.2d 779, 784 (11th Cir. 1992) 7
Gottried v. Frankel,
818 F.2d 485 (6th Cir. 1987) 7
Hecht Co. v. Bowles,
321 U.S. 321, 64 S. Ct. 587 (1944) ..... *passim*
Hirsch v. Corban Corporations, Inc.,
949 F. Supp. 296 (E.D. Pa. 1996) 8
Hirschey v. F.E.R.C.,
777 F.2d 1 (D.C. Cir. 1985) 24
International Broth. of Elec. Workers,
Local Union No. 474 v. NLRB.,
814 F.2d 697 D.C. Cir. 1987) 25
Johnston v. J.A. Hackney & Sons, Inc.,
300 F. Supp. 375 (E.D. N.C. 1969) 9
Kaynard v. Mego Corp.,
633 F.2d 1026 (2nd Cir. 1980) 7
Kinney v. Pioneer Press,
881 F.2d 485 7th Cir. 1989) 7, 17

Kobell v. Beverly Health and Rehabilitation Services, Inc. et al,
142 F.3d 428 (Table) (3rd Cir. 1998) xi
Kobell v. Beverly Health and Rehabilitation Services, Inc. et al,
Civil Action No. 96-1280 (W.D. Pa.),
Memorandum and Order dated Feb. 7, 1997 xi
Kobell v. Beverly Health and Rehabilitation Services, Inc. et al,
987 F. Supp. 409 (W.D. Pa. 1997) xi
Kobell v. Suburban Lines, Inc.,.
731 F.2d 1076 3rd Cir. 1984) 7, 8, 10, 12
Minnesota Mining and Mfg. Co. v. Meter,
385 F.2d 265 (8th Cir. 1967) 9
NLRB v. Health Care & Retirement Corp. of America,
511 U.S. 571, 114 S Ct. 1778 (1994) 24
NLRB v. Stationary Engineers, Local 39,
746 F.2d 530 (9th Cir. 1984) 21, 28
NLRB v. Washington Heights-West-Inwood Mental Health Coun.,
897 F.2d 1238 (2d. Cir. 1980) 21
Pascarell v. Vibra Screw, Inc.,
904 F.2d 874 (3rd Cir. 1990) 8
Porter v. Warner Holding Co.,
328 U.S. 395, 66 S. Ct. 1086,
90 L. Ed. 1332 (1946) 15
Pye v. Sullivan Bros. Printers, Inc.,
38 F.3d 58 (1st Cir. 1994) 7

Ratzlaf v. U.S.,
510 U.S. 135, 114 S. Ct. 655 (1994) 22
Scott v. El Farra Enters., Inc.,
863 F.2d 670 (9th Cir. 1988) 17
Sharp v. Koronis Parts Inc.,
927 F. Supp. 1208 (D. Minn. 1996) 9
Squillacote v. Graphic Arts International Union,
513 F.2d 1017 (7th Cir. 1975) 17
Squillacote v. Graphic Arts International Union,
540 F.2d 853 (7th Cir. 1976) 17
Walker Methodist Residence and Healthcare Center, Inc.,
227 NLRB 1630 (1977) 21
Weinberger v. Romero-Barcelo,
456 U.S. 305, 102 S. Ct. 1798 (1982) ..... i, 14

STATUTES

28 U.S.C. § 1254(1) xiii
28 U.S.C. § 1292(a)(1) ..... xii, 5
29 U.S.C. § 160(j) ..... xiv, 6, 16
29 U.S.C. § 160(l) 17
33 U.S.C. § 1251 *et seq* 14
33 U.S.C. § 1319(b) 14

OTHER AUTHORITIES

120 Cong. Rec. 12994 (May 2, 1974) 26
120 Cong. Rec. 16899 (May 30, 1974) 25
c. 120, Title I § 101, 61 Stat. 146 xii

S. Rept 93-766, 9 3d Cong., 2d Sess. 4;
H. Rep. 93-1051 90 3d Cong., 2d Sess. 3 23

RULES

Fed. R. Civ. Proc. 65 ..... 4, 29

DECISIONS BELOW

The proceedings below are officially and unofficially reported as follows:

1. Kobell v. Beverly Health and Rehabilitation Services, Inc. et al, 952 F. Supp. 242 (W.D. Pa. Jan. 26, 1997) (vacated and withdrawn from published volumes pursuant to an unpublished Memorandum and Order by the U.S. District Court for the Western District of Pennsylvania dated Feb. 7, 1997).
2. Kobell v. Beverly Health and Rehabilitation Services, Inc. et al, Civil Action No. 96-1280 (W.D. Pa.), Memorandum and Order dated Feb. 7, 1997 (unpublished) (granting partial summary judgment to the National Labor Relations Board) (Apdx C - 10).
3. Kobell v. Beverly Health and Rehabilitation Services, Inc. et al, 987 F. Supp. 409 (W.D. Pa. 1997) (granting injunctive relief) (Apdx C - 24).
4. Kobell v. Beverly Health and Rehabilitation Services, Inc. et al, 142 F.3d 428 (Table) (3rd Cir. 1998) (affirming injunctive relief) (Apdx B - 5).

JURISDICTION

On April 4, 1997, the United States District Court for the Western District of Pennsylvania issued an injunction which, in relevant part, requires the Petitioners here to reinstate strikers to employment positions that these strikers held prior to their work stoppage and their subsequent offers to return to work (Apdx. C-24, 46). The District Court's injunction was based largely upon an earlier summary judgment decision and order issued on February 7, 1997, in which the District Court concluded that the legal theory underlying the National Labor Relations Board's unfair labor practice allegation could not be subjected to examination by the District Court because any determination adverse to the Board would undermine the Board's pending administrative hearing (Apdx. C-10, 22).

Petitioners timely filed their Notice of Appeal on April 15, 1997 with the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1292(a)(1). The Court of Appeals had jurisdiction to review both the April 4, 1997 injunction as well as the earlier February 7, 1997 summary judgment decision since the two orders were closely related. Cohen v. Bd. of Trustees of Univ. of Medicine, 867 F.2d 1455, 1468 (3rd Cir. 1989).

On February 18, 1998, the Court of Appeals issued a Judgment Order affirming the judgment of the District Court. On March 26, 1998, Petitioners timely filed a Suggestion for Rehearing In Banc and Petition for Panel Rehearing. The

Court of Appeals denied the petition and suggestion on July 2, 1998. This Court has jurisdiction to issue a Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 10(j) of the National Labor Relations Act provides:

> The Board shall have power, upon issuance of a complaint as provided in a subsection(b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition, the Court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper. [29 U.S.C. § 160(j)].

Section 8(g) of the National Labor Relations Act provides:

> A labor organization before engaging in any strike, picketing, or any other concerted refusal to work at any health care institution shall, not less than 10 days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an additional agreement following certification or

recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this Act. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties. [29 U.S.C. § 158(g)].

STATEMENT OF THE CASE

Petitioners Beverly Health and Rehabilitation Services, Inc. and its subsidiary Beverly Enterprises-Pennsylvania, Inc. own and/or operate nursing homes, including twenty unionized nursing homes in Pennsylvania (Apdx. C-25). Those individual nursing homes (collectively the "Nursing Homes") are also Petitioners here. At all relevant times, three local unions (collectively the "Unions") have separately been certified as the representatives of bargaining units of employees at the Nursing Homes for purposes of collective bargaining. In 1994 and 1995, the collective bargaining agreements that covered these employees expired, and the Nursing Homes and the Unions negotiated in an effort to reach new agreements, but these negotiations were unsuccessful (Apdx. C-26).

On March 15, 1996, the Unions sent written notices to 15 of the Nursing Homes announcing the Unions' intent to commence a strike at 7:00 a.m. on March 29, 1996 (a Friday) to protest various alleged unfair labor practices related to bargaining (Apdx. C-27, D-49). These written notices were mandatory under Section 8(g) of the National Labor Relations Act (the "NLRA"), which requires a labor organization to give a health care institution at least ten days notice before commencing any kind of strike. Section 8(g) provides, in relevant part:

> A labor organization before engaging in **any** strike, picketing, or other concerted refusal to

> work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing . . . of that intention . . . . The notice shall state the date and time such action will commence. **The notice, once given, may be extended by the written agreement of both parties.**

29 U.S.C. § 158(g) (emphasis added).

On March 27, 1996, less than two days before the scheduled start of the strike, the Unions notified the Nursing Homes that the Unions were unilaterally extending the date and time of the strike by 71 hours until 6:00 a.m. on April 1, 1996 (a Monday). (Apdx. C-27, D-51). The Unions did not seek the Nursing Homes' consent to this unilateral extension prior to announcing the extension, and the Nursing Homes never gave consent, by any means, to the 71-hour extension. (Apdx. C-27). To the contrary, the Nursing Homes promptly informed the Unions in writing that their unilateral effort to extend the date and time of the strike did not comply with Section 8(g) and that the Nursing Homes would consider the strike to be illegal if the Unions did not issue a new 10-day strike notice (Apdx. C-28, D-53).[1]

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[1] The Nursing Homes also made an effort before the strike began to seek injunctive relief from the United States District Court for the Western District of Pennsylvania to prevent the threatened work stoppage, but the District Court declined to issue injunctive relief because it believe it lacked subject matter jurisdiction. Beverly Enterprises-Pennsylvania Inc. v. District 1199P Service Employees International Union, AFL-CIO, Case

Notwithstanding this written warning, the Unions conducted their three-day strike from April 1-4, 1996, with approximately 750 employees participating. (Apdx. C-28, D-48). During the strike, the Nursing Homes were obligated to make certain that their elderly and infirm residents continued to received proper medical care and daily living assistance. For that purpose, the Nursing Homes hired replacement workers. The Nursing Homes considered the strike to be illegal under Section 8(g), which meant the striking workers had no right to reinstatement and could even be discharged. However, when the strikers offered to return to work at the end of the strike, the Nursing Homes did not discharge them. Instead, the Nursing Homes retained the replacement workers and put all returning strikers on preferential rehire lists at the individual Nursing Homes where strikers had been employed. (Apdx. C-28, 29) This resulted in the immediate reinstatement of a large number of the strikers, though many were reinstated to shifts and working hours that were different from the schedules they had worked before the strike. (Id.). Those not promptly reinstated remained on the preferential rehire lists until vacancies occurred.

Despite these facts, National Labor Relations Board ("Board") issued an administrative complaint on July 8, 1996 asserting that the Nursing Homes committed an unfair labor practice by refusing to reinstate all strikers when they offered to return to work. Before an administrative hearing could be

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No. 96CV00064j (W.D. Pa. 1997) (unpublished), affirmed 141 F.3d 1153 (Table) (3d Cir. 1998).

completed, the Board filed for injunctive relief in the United States District Court for the Western District of Pennsylvania under Section 10(j) of the National Labor Relations Act seeking, in relevant part: (1) immediate reinstatement of the former strikers who had not yet returned to work; (2) immediate discharge of any replacement workers currently holding positions sought by the reinstated strikers; and (3) the restructuring of shifts and scheduled workers hours of the strikers who were reinstated to positions different from the positions they held at the time of the strike. (Apdx. C-46).

Like an ordinary preliminary injunction under Fed. R. Civ. Proc. 65, an injunction under Section 10(j) is designed to provide interim relief until such time as the Board completes its administrative proceedings and related enforcement proceedings. In making its determination regarding the appropriateness of injunctive relief, however, the District Court did not use the traditional four-part test that federal courts routinely employ in injunction cases. This four-part test requires a moving party to establish, among other things, a likelihood of success on the merits. Instead, the District Court applied a two-pronged test that the Court of Appeals for the Third Circuit has specially developed for injunctive actions under Section 10(j). This test does not require the Board to establish any likelihood of prevailing on the merits.

On February 7, 1997, the District Court issued a Memorandum and Order (Apdx. C-10) granting the Board's Motion for Partial Summary Judgment on the "substantial and not frivolous" portion of the two-pronged test. The District

Court concluded that it was obligated to defer to the Board's legal theory regarding Section 8(g) without independently examining the basis for that legal theory (Apdx. C-22). The District Court felt constrained by Third Circuit jurisprudence to defer to the Board's theory despite its conclusion that the Board's legal theory was in conflict with the plain language of Section 8(g) ("I want to say this, I wouldn't resolve the statutory interpretation issue the way the Board did. I don't read the statute that way . . . .") (Apdx. D-56).

The District Court then held a hearing on the factual allegations and subsequently issued an injunction on April 4, 1997 requiring the Nursing Homes, in relevant part, to reinstate all strikers to their former positions. The Nursing Homes timely filed a Notice of Appeal, and the United States Court of Appeals for the Third Circuit took jurisdiction over the appeal pursuant to 28 U.S.C. § 1292(a)(1).[2] The Court of Appeals issued a Judgment Order on February 18, 1998 affirming the District Court's decision (Apdx. B-5). On March 26, 1998, Petitioners sought panel rehearing and rehearing in banc, but that request was denied by an Order dated July 2, 1998 (Apdx. B-3).

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[2] On April 18, 1997, Petitioners filed with the Court of Appeals for the Third Circuit a Motion for Modification of Injunction During The Pendency of Appeal, but that motion was denied on April 28, 1997 (Apdx. B-8). On April 30, Petitioners filed an Application with this Court seeking modification to the injunction pending appeal (Application No. A-771), but the Application was denied by letter dated May 1, 1997 (Apdx. A-1).

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. THIS COURT NEEDS TO RESOLVE THE DEEP SPLIT OF AUTHORITY AMONG THE COURTS OF APPEALS REGARDING THE STANDARD THAT DISTRICT COURTS MUST APPLY IN INJUNCTION PROCEEDINGS UNDER SECTION 10(j).

This Court has never issued a decision construing or applying Section 10(j) even though Section 10(j) has been a part of the NLRA for more than 50 years.[3] Section 10(j) is an extraordinary statutory provision that permits the Board to obtain full remedial relief for an alleged unfair labor practice despite the fact that the Board has not held an administrative hearing regarding the allegation. The statute confers jurisdiction on United States district courts to grant such temporary relief or restraining order as the courts deem "just and proper." 29 U.S.C. § 160(j). No NLRA provision defines "just and proper" and no NLRA provision places any restriction on the equitable discretion of the district courts.

A deep split of authority has developed among the Courts of Appeals regarding the standard that a district court must employ when determining whether injunctive relief is appropriate under Section 10(j). Consistent with the statutory language, the Courts of Appeals for the First, Second,

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[3] Section 10(j) was added to the NLRA by amendment on June 23, 1947, c. 120, Title I § 101, 61 Stat. 146.

Seventh and Ninth Circuits, as well as the District Court for the District of Columbia Circuit, have concluded that the propriety of injunctive relief under Section 10(j) should be determined in accordance with the familiar four-part test that federal courts routinely use to determine whether injunctive relief is just and proper. Pye v. Sullivan Bros. Printers, Inc., 38 F.3d 58, 63 (1st Cir. 1994); Miller v. California Pacific Medical Center, 19 F.3d 449, 457 (9th Cir. 1994); Kinney v. Pioneer Press, 881 F.2d 485, 490 (7th Cir. 1989); Kaynard v. Mego Corp., 633 F.2d 1026, 1023 (2nd Cir. 1980); D'Amico v. U.S. Service Industries, Inc., 867 F. Supp. 1075 (D. D.C. 1994). This four-part test requires the moving party to establish: (1) a likelihood of success on the merits; (2) the potential for irreparable injury in the absence of an injunction; (3) that such injury outweighs any harm that an injunction would inflict on the party opposing the injunction; and (4) that the injunction sought is in the public interest. Sullivan Bros, 38 F.3d at 63.

In direct contrast, the Courts of Appeals for the Third, Fifth, Sixth, Tenth and Eleventh Circuits have rejected the four-part test and have created a significantly reduced two-pronged approach. Dowd v. Intern. Longshoremen's Ass'n, AFL-CIO, 975 F.2d 779 (11th Cir. 1992); Gottried v. Frankel, 818 F.2d 485, 495 (6th Cir. 1987); Kobell v. Suburban Lines, Inc., 731 F.2d 1076, 1084-1089 (3rd Cir. 1984); Boire v. Freight Carriers, Inc., 515 F.2d 1185, 1189-1193 (5th Cir. 1975); Angle v. Sacks, 382 F.2d 655, 660 (10th Cir. 1967).

The first part of the two-part test requires only that the

Board establish "reasonable cause" to believe that a violation of the NLRA has occurred. In the Third Circuit, this "reasonable cause" prong itself has been divided into two separate inquiries. A district court must first determine whether the legal theory that underlies the Board's unfair labor practice allegation is "substantial and not frivolous." Suburban Lines, 731 F.2d at 1088-1089. If the Board's legal theory meets this minimal requirement, the court then must determine whether the Board has demonstrated sufficient facts which, if true, would support an unfair labor practice finding under the legal theory presented , and the district court must view the facts in the light most favorable to the Board and without resolving credibility issues that may be raised by the evidence. Hirsch v. Corban Corporations, Inc., 949 F. Supp. 296, 299 (E.D. Pa. 1996). The Board's burden under the first prong of the test has been characterized by the Court of Appeals for the Third Circuit as being "relatively insubstantial." Suburban Lines, 731 F.2d at 1084.

The second prong of the test requires the Board to prove that temporary injunctive relief is "just and proper." Within the Third Circuit, the critical inquiry under this prong of the test is whether the requested relief is necessary to protect the collective bargaining process and necessary to preserve the Board's ability to ultimately exercise its remedial powers. Pascarell v. Vibra Screw, Inc., 904 F.2d 874, 878-879 (3rd Cir. 1990).[4]

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[4] In the remaining two Circuits, the test for obtaining injunctive relief under Section 10(j) is less clear. The Court of

II. THE EXISTING SPLIT OF AUTHORITY AMONG THE CIRCUITS POSES AN IMPORTANT QUESTION REGARDING THE POWER OF FEDERAL COURTS TO GRANT OR WITHHOLD EQUITABLE RELIEF FOR ALLEGED VIOLATIONS OF THE NLRA.

The threshold inquiry in any injunction proceeding is whether the moving party has met its "burden" under the applicable legal standard, and the outcome of an injunction proceeding often is controlled by how the moving party's "burden" is defined. There is an important substantive difference between the four-part test and the two-pronged test

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Appeals for the Fourth Circuit has not issued a decision, under Section 10(j), and the district courts within the Fourth Circuit disagree as to the appropriate test. Compare Johnston v. J.A. Hackney & Sons, Inc., 300 F. Supp. 375, 379-380 (E.D. N.C. 1969) (applying the four-part test) with D'Amico v. Cox Creek Refining Co., 719 F. Supp. 403, 407 (D. Md. 1989) (applying the two-pronged approach). The Court of Appeals for the Eighth Circuit issued a decision in 1967 adopting a two-pronged approach, but it emphasized that the "just and proper" prong includes analysis of the full panoply of equitable criteria that district courts regularly consider in injunction proceedings. Minnesota Mining and Mfg. Co. v. Meter, 385 F.2d 265, 272 (8th Cir. 1967). A recent District Court decision within the Eighth Circuit construed Minnesota Mining as being consistent with the decisions of the Courts of Appeals for the First, Second, Seventh and Ninth Circuits which employ the traditional four-part test for injunction proceedings. Sharp v. Koronis Parts, Inc., 927 F. Supp. 1208, 1210 (D. Minn. 1996).

with regard to the moving party's burden under Section 10(j). Under the four-part test, the moving party bears the burden of establishing a **likelihood** of success on the merits. This high standard is appropriate because of the extraordinary nature of the order that the moving party is seeking from the court prior to a full hearing on the merits of a moving party's claim.[5] The two-pronged test, on the other hand, sets a "relatively insubstantial" burden, as the Court of Appeals for the Third Circuit has candidly acknowledged. Suburban Lines, 731 F.2d at 1084. The Board's factual allegations are presumed to be true and cannot be rebutted by the opposing party. The Board's legal theory need only have some non-frivolous basis in law in order to be deemed "substantial and not frivolous." As a result, even though Congress did not provide lower standards for injunction proceedings brought under Section 10(j) than for injunctions generally, the Board can obtain injunctive relief under the two-pronged test even when a District Court concludes that there is very little likelihood that the Board's General Counsel will prevail at the end of the administrative process and any related enforcement proceedings.

The present case is a prime example of the profound injustice that can occur when the two-pronged test is

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[5] As the Court of Appeals for the First Circuit has noted, since "the interim relief sought by the Board is essentially the final relief sought, the likelihood of success should be **strong**." Sullivan Bros., 38 F.3d at 63 (emphasis in original) quoting from Asseo v. Pan American Grain Co., Inc., 805 F.2d 23, 29 (1st Cir. 1986)

employed. Section 8(g) of the NLRA requires a union to give a health care institution ten-days notice of the precise date and time of any strike so that the health care institution can arrange for the continued and uninterrupted care of its patients. It similarly requires a union to obtain the written agreement of the health care institution for any extension of the strike deadline. Here, the Unions unilaterally extended the date and time of their strike by three days (from Friday to Monday) without the written agreement of the Nursing Homes (indeed, over the Nursing Homes strong objections). Nevertheless, the Board sought and obtained an injunction under the two-pronged test even though the Board's legal theory had no "likelihood of success on the merits."

The District Court recognized that the Board's legal theory contradicts Section 8(g)'s unambiguous statutory language delineating the circumstances in which a strike notice may be extended. The District Court stated:

> "I want to say this, I wouldn't resolve the statutory interpretation issue the way the Board did. I don't read the statute that way . . ."

(Apdx. D-56). The District Court nonetheless granted an injunction because:

> "Third Circuit authority fails to reveal any inclination to abandon the reasonable cause/just and proper inquiry . . . (and) interim relief under Section 10(j) may be granted 'without the showing of irreparable harm and

> a likelihood of success on the merits, which are the ordinary requisites'. . . . '[T]he Regional Director as a plaintiff, has a very low threshold to meet his or her burden of proof.' As a District Court, I am not free to follow the lead of other courts of appeals when their jurisprudence on a point is at variance with Third Circuit decisions. Because I conclude that the reasonable cause/just and proper inquiry is alive and well in this circuit, I decline Beverly's invitation to replace it with traditional equity principles."

(Apdx. C-40, 41), quoting from Suburban Lines, 731 F.2d at 1078, and the concurring opinion of Judge Aldisert in Suburban Lines, 731 F.2d at 1095.

If the District Court had been free to apply the four-part test that it customarily would use for injunction cases, the District Court plainly would have concluded that the Board's legal theory was not likely to prevail on the merits. Instead, the District Court's equitable discretion was restricted by the two-pronged approach, which required the District Court to issue the injunction so long as the Board's legal theory was not frivolous.

Worse than that, because the Third Circuit has characterized the Board's burden under the "reasonable cause" prong as being "relatively insubstantial", the District Court held that it was precluded from undertaking **any** examination of the statutory language of Section 8(g) "to

determine the substantiality of the Board's legal theory" (Apdx. C-22). The District Court expressed concern that, if it determined that the Board's legal theory was contrary to the statute, such a determination "would be tantamount to a decision on the merits of the unfair labor practice charge pending before the Board" (Id).

By declining to examine the Board's legal theory, the District Court abdicated its judicial function under Article III of the Constitution and acted as a rubber stamp for the Board's injunction request. American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 318, 85 S. Ct. 955, 967 (1965) ("The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress."). The District Court never required the Board to demonstrate in this case that its legal theory was substantial and not frivolous because the Court concluded that any determination adverse to the Board would undermine the Board's legal position in the pending administrative proceeding. The Court of Appeals adopted this analysis without comment. Therefore, as a practical matter, the "reasonable cause" prong of the Third Circuit's two-pronged test is meaningless because the Board will automatically clear this hurdle in each case without any critical analysis by the applicable district court.

III. THE CREATION OF A TWO-PRONGED TEST FOR SECTION 10(j) PROCEEDINGS CONTRADICTS THIS COURT'S HOLDINGS IN ROMERO-BARELO AND HECHT CO.

The Third Circuit's two-pronged approach narrowly constricts a District Court's exercise of traditional equitable discretion. As a result, the Third Circuit's approach directly contradicts the Supreme Court's holdings in Weinberger v. Romero-Barcelo, 456 U.S. 305, 313, 102 S. Ct. 1798, 1803 (1982) and Hecht Co. v. Bowles, 321 U.S. 321, 64 S. Ct. 587 (1944). Both Romero-Barcelo and Hecht Co. involved efforts by federal government agencies to obtain injunctive relief under the authority of a federal statute.[6] The Court held in each of these cases that, when the moving party seeks an injunction under the authority of a federal statute, district courts must exercise the full range of their equitable powers unless the language of the governing statute clearly and inescapably requires the district courts to limit their

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[6] In Romero-Barcelo, the statute was the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*, which authorized the Administrator of the Environmental Protection Agency to seek injunctive relief for various violations of the Act, 33 U.S.C. § 1319(b). (Romero-Barcelo, 456 U.S. at 317-318, 102 S. Ct. at 1805-1806). Similarly, in Hecht Co., the relevant statutory language was Section 205(a) of the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U.S.C.A. App. Supp. II, Sections 901 *et seq.*, 925, which authorized the Price Administrator to seek injunctive relief to all violations of the Act. Hecht Co., 321 U.S. at 321-322, 64 S. Ct. at 588.

consideration of the traditional equitable criteria that are analyzed through the customary four-part test employed by district courts in injunction actions. Romero-Barcelo, 456 U.S. at 313, 102 S. Ct. at 1803; Hecht Co., 321 U.S. at 329-330, 64 S. Ct. at 592.

The Court's opinion in Romero-Barcelo is particularly instructive on this point. The Court emphasized that district courts traditionally have considered a wide range of equitable criteria when balancing the competing rights of parties who seek and oppose injunctive relief, and the Court then stated:

> These common place considerations applicable to cases in which injunctions are sought in the federal courts reflect a "practice with a background of several hundred years of history", Hecht Co. v. Bowles, supra, at 329, 64 S. Ct. at 591-92, a practice of which Congress is assuredly well aware. Of course, Congress may intervene and guide or control the exercise of the court's discretion, but we do not lightly assume that Congress has intended to depart from established principles. Hecht Co. v. Bowles, supra, at 329, 64 S. Ct. at 591. As the Court said in Porter v. Warner Holding Co., 328 U.S. 395, 398, 66 S. Ct. 1086, 1089, 90 L. Ed. 1332 (1946): "Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid

> legislative command. Unless a statute in so many words, or by necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.' Brown v. Swann, 10 Pet. 497, 503 [9 L. Ed. 508] . . ."

Romero-Barcelo, 456 U.S. at 313, 102 S. Ct. at 1803-1804.

The Court's holdings in Romero-Barcelo and Hecht Co. apply with equal force to injunction actions brought under Section 10(j) of the NLRA. Section 10(j) vests federal courts with "jurisdiction to grant the Board such temporary relief or restraining orders as it deems **just and proper**." 29 U.S.C. § 160(j) (emphasis added). The four-part test that federal courts routinely use in injunction actions is specifically designed to provide district courts with a framework for determining when injunctive relief is "just and proper." The language in Section 10(j) does not restrict a district courts' equitable discretion and plainly does not contain clear and unmistakable language requiring some reduced standard in injunction actions under Section 10(j).

The Courts of Appeals for the Seventh and Ninth Circuits relied heavily on Romero-Barcelo when they returned to the four-part test and overruled their prior decisions that had applied the two-pronged approach to injunction actions under Section 10(j). Miller v. California

Pacific Medical Center, supra, 19 F.3d at 457, overruling Scott v. El Farra Enters., Inc., 863 F.2d 670 (9th Cir. 1988) and Aguayo v. Tomco Carburetor Co., 853 F.2d 744 (9th Cir. 1988); Kinney v. Pioneer Press, supra, 881 F.2d at 491 overruling Squillacote v. Graphic Arts International Union, 540 F.2d 853 (7th Cir. 1976) and Squillacote v. Graphic Arts International Union, 513 F.2d 1017 (7th Cir. 1975). Similarly, the District Court for the District of Columbia relied heavily upon Romero-Barcelo and Hecht Co. when it rejected the two-prong approach and concluded that there is "no reason to depart from the traditional test of equitable relief under the just and proper language of Section 10(j) unless Congress had expressly, or by inescapable inference, otherwise sought to control the exercise of the court's discretion, which it has not done." D'Amico v. U.S. Service Industries Inc., supra, 867 F Supp. at 1084. Significantly, no Court of Appeals has ever issued a decision asserting that this Court's holdings in Romero-Barcelo and Hecht Co. do not apply with equal force to actions brought under Section 10(j) of the NLRA.

The statutory language of Section 10(j) does not mandate a two-pronged reasonable cause/just and proper analysis. Indeed, the phrase "reasonable cause" does not appear anywhere in Section 10(j) and, instead, has been imported by certain Courts of Appeals into the Section 10(j) analysis from statutory language in a different section of the NLRA -- namely, Section 10(l), 29 U.S.C. § 160(l).[7] Unlike

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[7] Section 10(l) provides, in relevant part:

Section 10(j), which leaves it to the discretion of the Board whether to seek injunctive relief, Section 10(l) expressly mandates that the Board petition for injunctive relief prohibiting the conduct listed in Section 10(l). Given this statutory language, the reasonable cause prong has statutory importance in Section 10(l) since the Court must determine whether the Board has met this statutory prerequisite for injunctive relief.

Unlike Section 10(l), Section 10(j) "erects no hurdle for the Board to jump over before petitioning the court for

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> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of Section 4(A), (B), or (C) or Section 8(b) or Section 8(e) or Section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has **reasonable cause** to believe such charge is true and that a complaint should issue, he **shall**, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred or is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon filing of any such petition, the District Court shall have jurisdiction to grant such injunctive relief for a temporary restraining order **as it deems just and proper**, notwithstanding any other provision of law . . . ."

29 U.S.C. § 160(l) (emphasis added).

interim relief." Miller, supra, 19 F.3d at 456. Since Congress did not include such language in Section 10(j), there is no legitimate basis for inferring such a requirement from Section 10(l), and doing so is directly contrary to this Court's holdings in Romero-Barcelo and Hecht Co..

IV. THE BOARD'S LEGAL THEORY IN THIS CASE IS GROUNDLESS, AND THE BOARD IS NOT LIKELY TO PREVAIL ON THE MERITS OF ITS CLAIM.

The Board's legal theory here cannot withstand scrutiny under either the traditional four-part test or the Third Circuit's specially-created two-pronged test. The Board's legal theory turns upon the construction of the statutory language in Section 8(g) of the NLRA. The legal question is whether Section 8(g) permits a union to unilaterally extend the date and time of an announced strike without the written agreement of the affected employer. The last sentence in Section 8(g) squarely answers this question by stating unambiguously: "The notice, once given, may be extended by the written agreement of both parties." 29 U.S.C. § 158(g). Notwithstanding this clear language, the Board has construed Section 8(g) so as to permit a Union to unilaterally extend a strike notice by up to 72 hours without the need for any agreement by the employer. Bio-Medical Applications of New Orleans, Inc., 240 NLRB 432 (1979).

In Chevron U.S.A. v. Natural Resources Defense

Council, Inc., 467 U.S. 837, 842, 104 S. Ct. 2778, 2782 (1984), this Court established the set of standards to be used by federal courts when reviewing an administrative agency's construction of that agency's own governing statute. A federal court must first determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id., 467 U.S. at 842-843, 104 S. Ct. at 2781. On the other hand, if Congress has not spoken to the precise question at issue, then the federal court must determine whether the administrative agency's construction of the statute is a permissible and reasonable one. Id., 467 U.S. at 843, 104 S. Ct. at 2782. This Court emphasized that federal courts are the final authority on issues of statutory construction and that federal courts must reject administrative constructions that are contrary to statutory language. Id., at n. 9.

The present case is one of the clearest possible examples of a statute having "directly spoken to the precise question at issue." Id., 467 U.S. at 842, 104 S. Ct. at 2781. Congress specifically mandated in Section 8(g) that any extension of a strike notice be done through the written agreement of both parties, and this statutory language prohibits a union from **unilaterally** extending the date and time of a strike by three days. Absent the written agreement of both parties, the Union's only option is to issue a new ten-day strike notice.

The fundamental purpose of Section 8(g) is to make certain that healthcare institutions have ten-days' notice of the precise date and time of a strike so that those health care institutions can ensure that a strike does not endanger the lives, medical services, or essential needs of patients in health care institutions. Walker Methodist Residence and Healthcare Center, Inc., 227 NLRB 1630, 1631 (1977); NLRB v. Stationary Engineers, Local 39, 746 F.2d 530, 533 (9th Cir. 1984); NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc., 897 F.2d 1238, 1247 (2nd Cir. 1990). By requiring the mutual agreement of both parties for any extension of a ten-day notice, Section 8(g) guarantees that a health care institution will have adequate time to adjust its strike preparation plans to arrange coverage for all patients at the new date and time of the strike. If the health care institution cannot make adequate alternative arrangements, then it can refuse to extend the strike date, and the union then needs to send the employer a new ten-day notice under Section 8(g).

In Bio-Medical, supra, 240 NLRB at 435, the Board created a 72-hour exception to the requirements of Section 8(g). The Board sought to justify this exception in two ways. First, the Board asserted that the last sentence of Section 8(g) was ambiguous because it provided: "The notice, once given, **may** be extended by the written agreement of both parties." 29 U.S.C. § 158(g) (emphasis added). The Board concluded that Congress' use of the word "may" meant that the written agreement of the parties was not the "exclusive manner of

extending an initial strike date" and that Congress' intent was to allow unions a reasonable time to unilaterally extend strike notices. Bio-Medical, 240 NLRB at 434. This "construction" of the statute defies common sense and defies well established principles of statutory construction.

Section 8(g)'s use of the "may" simply means that the parties can mutually agree to extend the strike date if they so choose, but they are not forced to do so. The construction that the Board seeks to give to Section 8(g) would make the last sentence of Section 8(g) meaningless. If "may" had been intended by Congress to mean that "the written agreement of both parties" was only one of many ways in which a strike notice could be extended, then the last sentence of Section 8(g) is completely superfluous. Giving Section 8(g) such a construction contradicts the well-established maxim of statutory construction that courts should "hesitate to treat as surplusage a statutory term in any setting . . . ." Bailey v. U.S., 516 U.S. 137, 116 S. Ct. 501, 506-507 (1995) quoting from Ratzlaf v. U.S., 510 U.S. 135, 114 S. Ct. 655, 659 (1994). Contrary to the Board's legal theory, the word "may" does not create any ambiguity in the statute and does not grant the Board any freedom to create exceptions that are contrary to the plain language of the statute.

Second, the Board argued in Bio-Medical, that a 72-hour exception was justified by certain Senate and House Commission Reports, which stated :

> Thus, it would be unreasonable, in the Committee's judgment, if a strike or picketing

> commenced more than 72 hours after the time specified in the notice. In addition, since the purpose of the notice is to give a health care institution advanced notice of the actual commencement of a strike or picketing, if a labor organization does not strike at the time specified in the notice, at least 12 hours notice should be given of the actual time for commencement of the action.

S. Rept 93-766, 9 3d Cong., 2d Sess. 4; H. Rep. 93-1051 90 3d Cong., 2d Sess. 3. See, Bio-Medical, 240 NLRB at 434, n. 8. The Board also relied on the joint remarks of two Congressmen who supported the House Committee Report's position. Id.

The Board's reliance on these snippets of legislative history as a basis for ignoring the unambiguous statutory language of Section 8(g) is insupportable and transgresses this court's frequently repeated insistence that the Board abide by the language of the NLRA and not seek to circumvent statutory language by relying on committee reports and similar legislative history that were not enacted into law:

> The Act is to be enforced according to its own terms, not by creating legal categories inconsistent with its meaning, as the Board has done in nurse cases. Whether the Board proceeds through adjudication or rulemaking, the statute must control the Board's decision, not the other way around. * * * It is the

> function of the Court and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means.

NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571, 114 S Ct. 1778, 1783-1784 (1994).

> It is not necessary for us to justify the policy of Congress. It is enough that we find it a statute. That policy cannot be defeated by the Board's policy, which would make an unfair labor practice out of that which is authorized by the statute . . . . To sustain the Board's contention would be to permit the Board under the guise of administration to put limitation in the statute not placed there by Congress.

Colgate-Palmolive-Peet Co. v. NLRB, 338 U.S. 355, 362, 70 S. Ct. 166 (1949). See also, U.S. American College of Physicians, 475 U.S. 834, 106 S. Ct. 1591, 1598 (1986) ([D]espite the [Committee] Reports' seeming endorsement of a per se rule, we are hesitant to rely on that inconclusive legislative history, either to supply a provision not enacted by Congress . . . or to define a statutory term enacted by a prior Congress"); Hirschey v. F.E.R.C., 777 F.2d 1, 7-8 (D.C. Cir. 1985) (then Circuit Judge Scalia, concurring) (discussing the unreliability of committee reports and the importance of judicial construction of statutory language without resort to legislative history).

Section 8(g) was added to the NLRA as part of the 1974 Non-Profit Hospital Amendments to the Labor Management Relations Act, and it was a delicate compromise achieved only after lengthy negotiations between members of Congress themselves and between Congress and the Executive Branch, as well as hospital associations, labor representatives and other interest groups. See, 120 Cong. Rec. 16899 (May 30, 1974) (remarks of Representative Thompson).[8] As a result, the legislative history relied on by

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[8] The history of artful compromises and outright dealmaking that was necessary to secure passage of the health care amendment is described quite well in International Broth. of Elec. Workers, Local Union No. 474 v. NLRB.,814 F.2d 697, 700-701, 710-715 (D.C. Cir. 1987). The concurring opinion of Circuit Judge Buckley is particularly instructive regarding the rank political purposes of the various committee reports.

"[T]here can be little doubt that the two committees expected the Board to pay attention to their directive -- not because it had the force of law, but because agencies are not given to ignoring the commands of potentates who control their budgets and oversee their operations. . . . This political reality is well understood by professionals. . . Thus, inclusion of the admonition in the committee reports could be expected to provide the margin of assurance required to secure the sport of at least some of the legislators and lobbyists who were concerned over the prospect of proliferating bargaining units. . .[T]hese political and legislative considerations (make) it necessary for judges to exercise extreme caution before concluding that a statement made in floor debate, or at a hearing, or printed in a committee report may be taken as statutory gospel. Otherwise, they run the risk of reading authentic insights into remarks intended to serve quite different purposes." Id., 814 F.2d at 816.

the Board is, if anything, evidence **against** the Board's construction of Section 8(g) because it demonstrates that some members of Congress sought a broader interpretation of Section 8(g) but those members could not obtain sufficient support to include the proposed 72-hour exception in the actual enacted language of Section 8(g).[9]

In light of the insubstantial basis for the Board's legal theory in Bio-Medical, it is not surprising that the Board's construction of Section 8(g) has never been approved or sanctioned by any Court of Appeals. The Bio-Medical decision itself was not challenged in any Court of Appeals. The only subsequent Board decision that relied on Bio-Medical, and that was subject to federal court review, was denied enforcement by the United States Court of Appeals for the Second Circuit. NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc., 897 F.2d at 1247, denying enforcement to Washington Heights-West Harlem Inwood Mental Health Council, Inc., 289 NLRB 1122 (1988).

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[9] Indeed, Senator Fannin specifically noted during the debate on Section 8(g) that the Senate Committee Report "in many respects is a curious document [because] there is an obvious intent to substitute the intent of the Senate for the words of the law." 120 Cong. Rec. 12994 (May 2, 1974). Senator Fannin noted several instances in which the report expressed "the sense of the Committee" -- including the issue of Unions unilaterally extending their strike notices -- and Senator Fannin repeatedly asked: "Why not put it in the law itself? If the words of the law are clear, courts do not look to Congressional intent". Id.

In Washington Heights, the Board found a Union's strike to be lawful under Section 8(g) even though the Union unilaterally delayed the strike for one day without notice to the health care institution. The Board concluded that the Union's failure to give any notice was not important since the health care institution was prepared for the strike, and the Board also concluded that the Union's strike was an unfair labor practice strike and, as such, was exempt from Section 8(g). In holding that unfair labor practice strikes were exempt from Section 8(g), the Board relied upon the same legislative history that it relied upon in crafting its extra-statutory "72-hour exception".

The Second Circuit expressed strong doubt concerning the Board's legal theory that a Union may unilaterally extend the date and time of its strike notice without the written agreement of both parties. The Court stated:

> We are not . . . at liberty to depart from the straightforward unambiguous language of the statute requiring the Union to specify in writing the date and time it would strike. Furthermore, we are convinced that the notice requirement is appropriately read strictly. At a health care institution, disruption in patient care of even a few hours may cost lives. 'Strict adherence to notice requirements is essential in the area of health care institutions, in light of Congress' concern `that sudden, massive strikes could endanger the lives and

health of patients. . . .'" NLRB v. Stationary Engineers Local 39, 746 F.2d 530, 533 (9th Cir. 1984) (citation omitted).

Washington Heights, 897 F.2d at 1247. The Second Circuit found it unnecessary, however, to directly rule on the Board's construction of Section 8(g) since, even under the Board's construction, a Union must provide at least 12 hours of supplementary notice, and the Union in that case had failed to do so.

It is significant, however, that when the Second Circuit later in the same decision rejected the Board's holding that unfair labor practice strikes were exempt from Section 8(g), the court did so because it concluded that the Board improperly relied on legislative history rather than the precise language of Section 8(g). The Court stated:

> We have doubts about the force of this legislative history. This [Committee] language carves an explicit exception to the notice requirement. . . . Where the full Congress has not done so, we cannot create an exception to the Act. [We] are somewhat hesitant to give this legislative history effect, because it not so much guides interpretation of ambiguous wording in the statute, but rather, creates a significant exception. * * * Section 8(g) notice protects the interest of third parties for whom an unanticipated work stoppage may be a life-or-death matter. We are

> reluctant to conclude that the full Congress intended to sacrifice the safety of the sick or dying to help labor organizations and health care institutions avoid a 10-day delay in going on strike.

Washington Heights, 897 F.2d at 1247-48. The court's criticism in this regard is equally applicable to the Board's "72-hour" exception, which has no source in Section 8(g).

CONCLUSION

The writ requested should issue because this case involves serious and substantial issues which divide the Courts of Appeals regarding the proper standard for issuance of injunctions under Section 10(j) of the NLRA and these issues are the type that are frequency reoccurring in federal district courts. These issues include: (1) should district courts employ the traditional four-part test or the specially-created two-pronged test in evaluating 10(j) injunction requests; (2) to what extent are the "equitable" standards of Fed. R. Civ. Proc. 65 applicable to 10(j) injunction requests, or is the Board (and/or other federal agencies) exempt from these general requirements; and (3) are district courts required to defer to a legal theory of the Board that contradicts the plain language of the NLRA, under either the four-part test or the two-pronged test.

Respectfully submitted,

LITTLER MENDELSON, P.C.
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Thomas P. Dowd
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Baltimore, Maryland 21202-3005
(410) 528-9545

Attorneys for the Petitioners
**Counsel of Record*.

Dated: September 16, 1998

APPENDIX A

SUPREME COURT
OF THE
UNITED STATES OF AMERICA

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

May 1, 1997

Mr. Warren Davison
The World Trade Center
Suite 1653
Baltimore, MD 21202-3005

Re: Beverly Health and Rehabilitation Services, Inc., et al. v. Gerald Kobell, et al., Application No. A-771

Dear Mr. Davison:

The application for a stay of injunction pending appeal in the above-entitled case has been presented to Justice Souter, who on May 1, 1997 denied the application.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By Christopher W. Vasil
Christopher W. Vasil
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 97-3200 and 97-3357

GERALD KOBELL, ET AL.
Appellee in No. 97-3200
Appellant in No. 97-3357

v.

BEVERLY HEALTH AND REHABILITATION
SERVICES, INC.
Appellants in No. 97-3200
Appellees in No. 97-3357

SUR PETITION FOR REHEARING

BEFORE: BECKER, Chief Judge, SLOVITER, STAPLETON, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, McKEE, and RENDELL, Circuit Judges, and POLLAK,* District Judge

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*Hon. Louis H. Pollak, Senior U. S. District Judge for the Eastern District of Pennsylvania, was a member of the original panel. His vote is limited to panel rehearing only.

The petition for rehearing filed by appellants Beverly Health and Rehabilitation Services, Inc., et al., in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the court,

/s/
Circuit Judge

DATED: JUL 2, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 97-3200 and 97-3357

GERALD KOBELL, REGIONAL DIRECTOR FOR
REGION SIX OF THE NATIONAL LABOR
RELATIONS BOARD FOR AND ON BEHALF OF THE
NATIONAL LABOR RELATIONS BOARD

Appellee in No. 97-3200
Appellant in No. 97-3357

v.

BEVERLY HEALTH AND REHABILITATION
SERVICES, INC., ITS OPERATING REGIONAL
OFFICES, WHOLLY-OWNED SUBSIDIARIES AND
INDIVIDUAL FACILITIES AND EACH OF THEM,
AND/OR ITS WHOLLY-OWNED SUBSIDIARY;
BEVERLY ENTERPRISES-PENNSYLVANIA, INC.,
d/b/a BEVERLY MANOR OF MONROEVILLE
d/b/a CLARION CARE CENTER
d/b/a FAYETTE HEALTH CARE CENTER
d/b/a GRANDVIEW CARE CENTER
d/b/a HAIDA MANOR
d/b/a MEADVILLE CARE CENTER

d/b/a MEYERSDALE MANOR
d/b/a MT. LEBANON MANOR CONVALESCENT CENTER
d/b/a MURRAY MANOR
d/b/a RICHLAND MANOR
d/b/a WILLIAM PENN NURSING CENTER
d/b/a BEVERLY MANOR OF READING
d/b/a BEVERLY MANOR OF LANCASTER
d/b/a BLUE RIDGE HAVEN CONVALESCENT CENTER WEST
d/b/a CALEDONIA MANOR
d/b/a CAMP HILL CARE CENTER
d/b/a CARPENTER CARE CENTER
d/b/a STROUD MANOR
d/b/a YORK TERRACE NURSING CENTER

Appellants in No. 97-3200
Appellees in No. 97-3357

On Appeal from the United States District Court For the
Western District of Pennsylvania
(D.C. Civil Action No. 96-cv-01280)
District Judge: Honorable D. Brooks Smith

Argued January 23, 1998

BEFORE: BECKER,* Chief Judge, STAPLETON Cir. Judge and POLLAK,** District Judge

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JUDGMENT ORDER

After consideration of the contentions raised by appellants in No. 97-3200 and appellant in No. 97-3357, it is

ORDERED AND ADJUDGED that the judgments of the district court entered April 7, 1997, be and the same are hereby affirmed.

Cost taxed against appellants in No. 97-3200 and against appellant in No. 97-3357.

By the Court,

/s/ Walter K. Stapleton

Circuit Judge

ATTEST:

/s/ P. Douglas Sisk

P. Douglas Sisk, Clerk

DATED: FEB 18, 1998

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*Chief Judge as of February 1, 1998.

**Hon. Louis H. Pollak, Senior U. S. District Judge for the Eastern District of Pennsylvania, was a member of the original panel. His vote is limited to panel rehearing only.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

E-53-E
April 23, 1997

No. 97-3200

GERALD KOBELL, et. al.
v.
Beverly Health and Rehabilitation
Services, Inc.,
Appellant

(D.C. Civil No. 96-cv-01280 DBS)

PRESENT: SCIRICA AND NYGAARD, Circuit Judges

1. Motion by Appellants Beverly Health et al for modification of injunction during the pendency of appeal.
2. Brief in support of motion for modification of injunction.
3. Motion for leave to file amicus submission on emergent motion for stay by Hospital and Healthsystem Association of PA. (With Attachment)
4. Opposition by the NLRB to appellant's motion for modification of injunction pending appeal.

5. Opposition by the NLRB to motion of Hospital Healthsystem for Leave to file amicus submission.

6. Motion for leave for oral argument on motion for modification of injunction during pendency of appeal.

Emergency Date is May 5, 1997
Response due April 23, 1997 at 12:00 AM

/s/ Susan M. Acerba
Susan M. Acerba 597-3014
Case Manager

ORDER

The motion by appellants Beverly Health, et al. for modification of injunction during the pendency of appeal is denied.

The motion for leave for oral argument is moot.

The motion for leave to file amicus submission on emergency motion for stay by Hospital and Healthsystem Association of PA is granted.

By the Court,

/s/
Circuit Judge

Dated: April 28, 1997

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GERALD KOBELL, Regional Director for Region Six of the National Labor Relations Board, Plaintiff	)	
vs.	)	Civil Action No. 96-1280
BEVERLY HEALTH AND REHABILITATION SERVICES, INC., et al., Defendants	)	

MEMORANDUM

SMITH, District Judge

I. Introduction

On July 8, 1996, Gerald Kobell, Regional Director for Region Six of the National Labor Relations Board (hereinafter the Board), filed a Complaint and Motion for Injunctive Relief against Beverly Health and Rehabilitation Services, Inc., against some of its subsidiaries, and against twenty health care facilities it operates in the Commonwealth

of Pennsylvania (hereinafter referred to collectively as Beverly). The Board sought interim relief under section 10 (j), 29 U. S. C. § 160 (j), of the National Labor Relations Act (NLRA), pending final disposition by the Board of unfair labor practice charges filed by employees of the twenty Beverly health care facilities. Docket no. 1. The parties have filed cross-motions for partial summary judgment which require determining whether the Board's legal theory regarding notice under § 8(g) of the NLRA is "substantial and not frivolous." Docket nos. 18 and 27.

II. Facts and Procedural History

Beverly owns and operates over 750 health care facilities nationwide which provide care for elderly or infirm individuals. The service and maintenance employees at twenty of these health care facilities in Pennsylvania are unionized. Docket no. 19, ¶3. The most recent collective bargaining agreements expired on November 30, 1995, except at two of the facilities where the agreements expired on December 31, 1994. Docket no. 19, ¶5.

Despite the expiration of the collective bargaining agreements, the unionized staff continued to work while negotiations proceeded. The unionized employees complained that certain changes at the health care facilities where they worked violated their rights under the NLRA to engage in concerted activity. The following examples represent some of the alleged violative conduct by Beverly:

removal of union bulletin boards; denial of established access, at the respective facilities, of union representatives to union members; changes in health care insurance; reduction in work hours; unilateral changes in employee policies; denial of information relevant to contract negotiations; prohibitions against wearing union insignia; and prohibitions against bringing union literature onto the premises. It is also alleged that Beverly had direct contact with unionized employees in an effort to influence them concerning their continued affiliation with the union. Docket no. 1. These alleged unfair labor practices resulted in the filing of numerous charges with the Board against Beverly. See docket no. 1. Thereafter, the unions voted to authorize strikes at fifteen of the facilities.

On or about March 15, 1996, the unions gave notice to the fifteen facilities of their intent to engage in an unfair labor practice strike commencing at 7:00 A.M. on Friday, March 29, 1996. The notice specifically stated that the written notice was being served as required by § 8(g) of the NLRA, enacted as part of the 1974 Nonprofit Hospital Amendments to the Labor Management Relations Act. 29 U.S.C. §158(g). Docket no. 18, exh. A.

On March 27, 1996, the unions gave an additional notice to the fifteen facilities, this time advising of their intent to extend the commencement of the strike from Friday, March 29, 1996 at 7:00 A.M. to Monday, April 1, 1996 at 6:00 A.M. It is undisputed that Beverly did not consent, either orally or in writing, to this 71 hour extension.

The unions were advised by Beverly that the extension notice failed to fulfill the literal statutory requirements set forth in §8 (g) , and that it would consider unlawful any strike held pursuant to the seventy-one hour extension notice. Despite Beverly's lack of consent, a strike began on April 1, 1996 at the fifteen facilities, and continued until April 4, 1996 at about 7:00 A.M.

On the first day of the strike, Beverly sought injunctive relief from this court in a separate civil action claiming that the extension of the strike notice violated the extension requirements of §8(g). Beverly Enterprises - Pennsylvania Inc. et al. v. District 1199P, Service Employee International Union. AFL-CIO et al., Civil Action No. 96-64J (W.D. Pa.). I denied a request for a temporary restraining order, and Beverly withdrew its request for preliminary injunctive relief. Thereafter, in December 1996, I dismissed Beverly's complaint after concluding that the Board had exclusive jurisdiction to resolve the dispute, under San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959)

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After the strike concluded on April 4, 1996, Beverly refused to reinstate approximately 350 striking employees. Approximately 100 other striking employees returned to work, but were not permitted to resume their former positions. Docket no. 1, ¶ 5(ss) and (tt). Negotiations between Beverly and its employees continued to be unfruitful. Thereafter, on May 9, 1996, the Board issued an order

consolidating all of the unfair labor practice charges against Beverly, and a consolidated complaint and notice of hearing were filed with the agency. Docket no. 1, ¶ 5(a). The Board issued an amended consolidated complaint on June 19, 1996. Id., ¶ 5 (b).

On July 8, 1996, the Board initiated this action by filing a consolidated Complaint and Petition for Injunction Under Section 10(j) of the NLRA, requesting "appropriate injunctive relief" pending its final disposition of the unfair labor practice charges against Beverly. Docket no. 1. The Board contended that there was "reasonable cause" to believe the allegations that Beverly engaged in the unfair labor practices cited in its administrative complaint against Beverly. It further claimed that injunctive relief to prohibit Beverly from continuing to engage in conduct allegedly violative of sections 7 and 8 of the NLRA would be "just and proper." In the absence of injunctive relief, the Board contended that Beverly would continue "to restrain and coerce employees in the exercise of the rights guaranteed in section 7 of the Act . . . ." Docket no. 1 ¶ *. The Board further claimed that, unless Beverly is enjoined, a "serious flouting of the Act will continue, with the result that enforcement of important provisions of the Act and the public policy underlying the same will be thwarted. . . ." Id., at ¶ 9. The prayer for injunctive relief not only addressed the conduct constituting the alleged unfair labor practices which occurred prior to the strike, but also requested the reinstatement to their former

positions of all employees who had unconditionally offered to return to work on April 4, 1996 following the April 1 strike. Id., ad damnum clause, ¶¶ 1 and 2.

In its Memorandum of Points and Authorities in Support of Complaint and Petition for Injunctive Relief, the Board identified the central issue before me as whether the Board had reasonable cause to believe that Beverly violated the Act by:

> refusing to properly reinstate hundreds of employees who engaged in a protected strike to protest [Beverly's] unfair labor practices and by making unilateral changes and engaging in other conduct which undermined the Unions' status as exclusive bargaining representatives. . . .

Docket no. 8, at 3. The Board's position. in short, is that the strike complied with § 8(g) because the unilateral extension was consistent with longstanding Board precedent.

Beverly answered the Board's Complaint and Petition for Injunction and immediately moved for partial summary judgment. Docket nos. 16 and 18. Its motion asserted that the Board's request for reinstatement of striking employees should be denied because the Board could not satisfy the prerequisites for a § 10(j) injunction. Beverly argued that the strike was illegal because the notice extending the strike date for 71 hours was issued unilaterally. Beverly submitted that the unions' failure to obtain its agreement as required by the

clear and unambiguous language of § 8(g) rendered the strike unlawful, and that, therefore, the striking workers seeking reinstatement were unprotected by the Act. Docket no. 19.

The Board responded with its own motion for partial summary judgment. It contends, not surprisingly, that its legal theory that Beverly's failure to reinstate the striking employees is well grounded and more than satisfies its burden under §10(j). Docket no. 28.

III. Discussion

A. Overview

Under § 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j),[1] district courts are authorized to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. To resolve § 10(j) petitions, district courts in the Third Circuit apply a two-

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[1]Section 160(j) provides in relevant part:

> (j) The Board shall have power, upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court. . . . for appropriate temporary relief or restraining order. Upon the filing of any such petition the court . . . shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

pronged test: 1) is there "reasonable cause to believe" that a violation of the Act has occurred; and 2) is temporary injunctive relief "just and proper." Pascarall v. Vibra. Screw Inc., 904 F.2d 874, 877 (3d Cir. 1990) (citing Kobell v. Suburban Lines, 731 F.2d 1076, 1088-89 (3d Cir. 1984)).

The "reasonable cause, inquiry has itself

> been refined into a two pronged standard. First, there must be a substantial, non-frivolous, legal theory, implicit or explicit, in the Board's argument, and second, taking the facts favorably to the Board, there must be sufficient evidence to support that theory.

Pascarell, 904 F.2d at 882 (citing Kobell, 731 F.2d at 1084). The breadth of this inquiry is limited because a § 10(j) proceeding is ancillary to the unfair labor practice charges committed to the exclusive jurisdiction of the Board. See Hirsch v. Building & Const. Trades Council, Etc., 530 F.2d 298, 302 (3d Cir. 1976) (discussing the extent of the showing required for an injunction under § 10(l), a companion provision within the NLRA). The Board "need not prove that a violation of the NLRA has in fact occurred. Nor must [it] convince the district court of the validity of the legal theory upon which [it] predicates (its] charges." Id. The Board's burden of proof in a reasonable cause determination is "relatively insubstantial." Id., see also Kobell, 731 F.2d at

1084.

Although the "just and proper" prong is derived directly from the language of § 10 (j) , the Act does not define the term. Pascarell, 904 F.2d at 878. The Third Circuit has held that the "just and proper" prong is satisfied:

> when the nature of the alleged unfair labor practices are likely to jeopardize the integrity of the bargaining process and thereby make it impossible or not feasible to restore or preserve the status quo pending litigation. The theory is that the chilling effect of management retaliation may outlast the curative effects of any remedial action the Board might take including reinstating illegally discharged workers. Ultimate reinstatement may very well not vindicate the public interest in the "integrity of the collective bargaining process."

Id., at 878-79 (citing Eisenberg, Etc. v. Wellington Hall Nursing Home, 651 F.2d 902, 907 (3d Cir. 1981)).

Although the Board has filed for summary judgment under § 10(j) , that motion is not yet ripe for resolution. The crossmotions for partial summary judgment at issue herein seek only to have this Court determine whether the Board's legal theory concerning § 8(g) of the NLRA is "substantial and not frivolous." For that reason, this opinion only addresses the issue of the substantiality of the Board's legal

theory, which is the first prong of the "reasonable cause" inquiry under § 10(j).

B. Substantiality of the Board's Legal Theory

The notification statute at issue reads as follows:

> Notification of intention to strike or picket at any health care institution
>
> A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by written agreement of both parties.

29 U.S.C. § 158(g).

Although the bare language of the statute makes no mention of it, the Board argues that extensions of up to

seventy-two hours are well -established in labor law. As proof of this, it directs the Court to the Board's own precedent, Bio-Medical Applications of New Orleans, Inc.., 240 NLRB 432 (1979), which holds that a union's unilateral extension of a strike date within a 12 to 72 hour period does not constitute an unfair labor practice despite § 8(g)'s language regarding extensions of strike dates.

That decision relied upon the legislative history of §8(g) which addressed brief delays by a union in the timing of a strike after the initial ten day notice has been tendered.[2] The Board reasoned that the "Union was in substantial compliance with Section 8 (g) and that to apply Section 8 (g) here in such a technical fashion so as to deprive the strikers of their status as employees would constitute an unwarrantedly harsh result not intended by Congress." 240 NLRB at 435-36.

The Board argues that Bio-Medical Applications has been uniformly followed since it was decided in 1979, and that its interpretation has not been altered by any circuit court decision or by any Congressional action. Based on this 17-year old precedent, the Board contends that it has reasonable cause to believe that Beverly has committed an unfair labor

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[2]The amendment was prompted by "Congress' concern 'that sudden, massive strikes [at health care institutions] could endanger the lives and health of patients. . . .'" NLRB v. Washington Heights-Mental Health Coun., 897 F.2d 1238, 1247 (2d Cir. 1990) (quoting NLRB v. Stationary Eng'rs. Local 39, 746 F.2d 530.533 (9th Cir, 1984))

practice due to its failure to reinstate approximately 350 striking employees, as well as its failure to place approximately 100 other reinstated employees to the same positions that they held before the strike.[3]

Beverly, on the other hand, asserts that the Board falls short of meeting the "substantial and not frivolous" requirement of the reasonable cause determination. The Board's legal theory fails, in Beverly's view, because the unions, unilateral extension of the strike date is contrary to clear and unambiguous language in the Act which seems to require an agreement by both parties.

Beverly's opposition is centered upon the judicial scrutiny of agency interpretations of statutes mandated by the Supreme Court in Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Under Chevron, if Congress's intent is clear, then that clearly-expressed intent of Congress must be enforced. 467 U.S. at 842-43. Any agency interpretation contra to the statutory mandates of Congress cannot withstand judicial scrutiny.

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[3]Failure to reinstate an unfair labor practice striker who has made an unconditional offer to return to work violates §§ 8 (a) (1) and (3) of the NLRA. Cast Optics 458 F.2d at 407-08. The Board notes that it is well established that "unfair labor practice strikers may not be permanently replaced and are entitled to immediate reinstatement upon making an unconditional offer to return to work." Docket no. 8, at 23 (citing, inter alia NLRB v. Cast Optics Corp., 458 F.2d 398, 407-08 (3d Cir.), cert. denied 409 U.S. 850 (1972)).

However, Beverly fails to understand the statutorily-established procedural posture or this case. Beverly's assertion that I must construe § 8 (g) before I can determine the substantiality of the Board's legal theory is flawed, and out of line with the system of judicial review crafted by Congress for labor relations cases. Conducting a full Chevron review of § 8 (g) of the Act as it relates to this case would be tantamount to a decision on the merits of the unfair labor practice charge pending before the Board. Third Circuit jurisprudence clearly instructs that district courts cannot reach the merits of a decision in § 10(j) proceedings. Kobell, 731 F.2d at 1084; Hirsch, 530 F.2d at 302. See also Local 30, United Slate, Tile & Comp. Roofers v. NLRB 1 F.3d 1419, 1425 n. 9 (3d Cir. 1993) ("a section 10(l) proceeding is independent of the proceeding on the merits . . . .").

A district court's scrutiny of the Board's legal theory in a § 10(j) proceeding requires only a determination of whether the legal theory has a reasonable foundation, not whether the Board's theory is "valid." Kobell, 731 F.2d at 1084 (quoting Hirsch, 530 F.2d at 302). As stated in Kobell, "discerning the plausible penumbras of Labor Act provisions is a task that a three-judge appellate tribunal with responsibility to secure uniformity in the law is better equipped to perform than a trial court." 731 F.2d at 1085.

Beverly asserts correctly that the Board cannot avoid judicial evaluation of an untested legal theory in conflict with the plain language of the statute. Presuming that the Board

follows its precedent in this case, and determines that Beverly committed an unfair labor practice, Beverly will have the opportunity to obtain the judicial evaluation it seeks from the Court of Appeals, under the appellate procedure established by Congress. See 29 U.S.C. §160(f).

IV. Conclusion

The Board's legal theory concerning § 8(g) of the NLRA, is substantial and nonfrivolous. Partial summary judgment on this issue will be granted for the Board and against Beverly. Because the Board has established that its legal theory regarding § 8(g) is "substantial and not frivolous," an evidentiary hearing will be scheduled to inquire as to the suitability of injunctive relief under the "just and proper" prong of the "reasonable cause" standard. A separate order will be issued this date.

BY THE COURTS,

Date: /s/ 2/7/97

/s/ D. Brooks Smith
D. Brooks Smith
United States District Judge

cc: All Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

GERALD KOBELL,	)	
Regional Director for Region	)	
Six of the National Labor	)	
Relations Board,	)	
Plaintiff	)	
vs.	)	Civil Action No.
	)	96-1280
BEVERLY HEALTH AND	)	
REHABILITATION SERVICES,	)	
INC., et al.,	)	
Defendants	)	

MEMORANDUM AND ORDER

SMITH, District Judge

I. Introduction

Before the court in this labor controversy is a Petition for Injunction filed by Gerald Kobell, the Regional Director for Region Six of the National Labor Relations Board (hereinafter "the Board") against Beverly Health and Rehabilitation Services, Inc., some of its subsidiaries and twenty of its health care facilities in the Commonwealth of Pennsylvania (hereinafter collectively referred to as Beverly).

The petition seeks temporary relief pursuant to § 10(j) of the National Labor Relations Act (NLRA), 29 U.S.C. §160(j), pending the resolution of unfair labor practice charges filed with the Board by employees of the twenty Beverly health care facilities. I conducted an evidentiary hearing on February 19 and 20, 1997, and the following constitute my findings of fact and conclusions of law.

II. Facts

I previously addressed cross-motions for partial summary judgment in this case and determined that the Board's legal theory was substantial and not frivolous. See dkt.no. 67. An excerpt from my memorandum disposing of those cross-motions supplements the record from the hearing and sets forth certain undisputed facts which are necessary to the resolution of the instant motion for injunctive relief.

> Beverly owns and operates over 750 health care facilities nationwide which provide care for elderly or infirm individuals. The service and maintenance employees at twenty of these health care facilities in Pennsylvania are unionized.[1] Dkt. no.

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[1]The service and maintenance employees at these twenty Beverly health care facilities are represented by three local unions of the Service Employees International Union: District 1199P represents employees at eleven of the facilities; Local Union 585 represents employees at five of the facilities, and the employees at the remaining four facilities are represented by Local Union 668. Dkt. no. 77, at 10-11.

19, ¶ 3. The most recent collective bargaining agreements [CBAs] expired on November 30, 1995, except at two of the facilities where the agreements expired on December 3 1, 1994. Dkt.no. 19, ¶ 5.

Despite the expiration of the collective bargaining agreements, the unionized staff continued to work while negotiations proceeded. The unionized employees complained that certain changes at the health care facilities where they worked violated their rights under the NLRA to engage in concerted activity. The following examples represent some of the alleged violative conduct by Beverly: removal of union bulletin boards; denial of established access, at the respective facilities, of union representatives to union members; changes in health care insurance; reduction in work hours; unilateral changes in employee policies; denial of information relevant to contract negotiations; prohibitions against wearing union insignia; and prohibitions against bringing union literature onto the premises. It is also alleged that Beverly had direct contact with unionized employees in an effort to influence them concerning their continued affiliation with the union. Dkt.no. 1. These alleged unfair labor practices resulted in the filing of numerous charges with the Board against Beverly. See dkt.no. 1.

Dkt.no 67, at 2-3.

The alleged unfair labor practices occurred at some, but not all, of the health care facilities. Dkt.no. 77, at 27-32; Pl.Exh. 1. The predominant unfair labor practices were the removal of union bulletin boards and the denial of employee access at the health care facilities to the union representatives. Pl.Exh. 1.

Thereafter the unions voted to authorize strikes at fifteen of the facilities.

On or about March 15, 1996, the unions gave notice to the fifteen facilities of their intent to engage in an unfair labor practice strike commencing at 7:00 A.M. on Friday, March 29, 1996. The notice specifically stated that the written notice was being served as required by §8(g) of the NLRA, enacted as part of the 1974 Nonprofit Hospital Amendments to the Labor Management Relations Act. 29 U.S.C. §158(g). Dkt. no. 18, exh. A.

On March 27, 1996, the unions gave an additional notice to the fifteen facilities, this time advising of their intent to extend the of the strike from Friday, March 29, 1996 at 7:00 A.M. to Monday, April 1, 1996 at 6:00 A.M. It is undisputed that Beverly did not consent, either orally or in writing to this 71 hour extension.

The unions were advised by Beverly that the extension notice failed to fulfill the literal statutory requirements set forth in §8(g), and that it would

> consider unlawful any strike held pursuant to the seventy-one hour extension notice. Despite Beverly's lack of consent, a strike began on April 1, 1996 at the fifteen facilities, and continued until April 4, 1996 at about 7:00 A.M.

Dkt.no. 67, at 3-4.

The union notices to Beverly of its intent to strike at each of the fifteen facilities state that the "union shall begin to engage in a strike, picketing and other concerted refusal to work activities to protest unfair labor practices committed by Beverly Dkt.no. 76, exh. A (emphasis added). The extension notices from the union also state that "the Union shall engage an unfair labor practice strike. . ." Id., exh. B (emphasis added). Beverly acknowledged the union's characterization of its activity as an unfair labor practice strike when it responded to the union that it considered the union's notice of the 71 hour extension defective. Id. exh. C.

After the strike concluded on April 4, 1996, Beverly refused to reinstate many of the striking employees, despite an unconditional offer by all of them to return to work. Beverly reinstated to their former positions a total of 290 employees, from April 1996 to January 1997. Dkt.no. 77, at 62. Another 237 employees were recalled, but not to their former positions. Many of the employees were recalled to part-time capacities in different positions, or to different shifts from those they had worked in before the strike. Dkt. no. 77, at 6 1. As of January 1997, 66 employees had not been

reinstated and a total of 115 either quit or been fired. Dkt.no. 77, at 66; pl. exh. 14.

> [O]n May 9. 1996, the Board issued an order consolidating all of the unfair labor practice charges against Beverly, and a consolidated complaint and notice of hearing were filed with the agency. Dkt.no. 1, ¶5(a). The Board issued an amended consolidated complaint on June 19, 1996. Id., ¶5(b).
>
> On July 8, 1996, the Board initiated this action by filing a consolidated Complaint and Petition for Injunction Under Section 10(j) of the NLRA, requesting "appropriate injunctive relief" pending its final disposition of the unfair labor practice charges against Beverly. Dkt.no. 1. The Board contended that there was "reasonable cause" to believe the allegations that Beverly engaged in the unfair labor practices cited in its administrative complaint against Beverly. It further claimed that injunctive relief to prohibit Beverly from continuing to engage in conduct allegedly violative of sections 7 and 8 of the NLRA would be "just and proper." In the absence of injunctive relief, the Board contended that Beverly would continue to restrain and coerce employees in the exercise of the rights guaranteed in Section 7 of the Act...." Dkt.no. 1, ¶8. The Board further claimed that, unless Beverly is enjoined, a "serious flouting of the Act will continue, with the result that enforcement

of important provisions of the Act and the public policy underlying the same will be thwarted...." Id., at ¶9. The prayer for injunctive relief not only addressed the conduct constituting the alleged unfair labor practices which occurred prior to the strike, but also requested the reinstatement to their former positions of all employees who had unconditionally offered to return to work on April 4, 1996 following the April 1 strike. Id., ad damnum clause ¶¶1 and 2.

Dkt.no. 67, at 5-6.

During the evidentiary hearing before me, the Board called several witnesses to testify. The chief witness was Thomas V. DeBruin, the president of Local 1199P and the designated chief spokesperson in contract negotiations for all three locals. Dkt.no. 77, at 15.

DeBruin's testimony established that, after the expiration of the collective bargaining agreement, the bulletin boards in many of the facilities were either taken down by the employer, or union personnel were forbidden from posting any information on them. Id., at 24. According to DeBruin, lack of access to the bulletin boards "seriously limited" the union's ability to communicate regularly with its members in the various facilities. Id., at 28.

In addition to the removal of bulletin boards, Beverly also curtailed access to union representatives after the expiration of the CBAs. Under previous agreements, union staff were permitted to contact members during the work day

and meet with them in break rooms. After the agreements expired, union access to employees was barred unless the administrator of a particular facility approved the meeting beforehand. Dkt.no. 77, at 30. In some cases, police were called to have the union representative removed from the facility. Id.

In some facilities, union personnel were instructed not to talk about the union, and not to wear union buttons and insignia. Dkt.no. 77, at 50-51. This anti-union message from management also took the form of conspicuous records-keeping of certain concerted union activities at some facilities. Some union members who participated in activities such as informational picketing observed either management personnel recording the names of participants or security personnel filming the participants engaged in the activity. Dkt.no. 77, at 51-52. These efforts by management had a chilling effect on union members and discouraged full employee participation. Id., at 53.

Union strength at the facilities was also affected by the gradual return to work of many of the employees who engaged in the April 1, 1996 strike. This return to work at varying hours and different positions affected the union's efforts to effectively bargain with Beverly in two ways. First, with employees returning to different jobs and shifts, the union had to reestablish its leadership at each facility, as well as its communication network. The disruption of the normal union communication channels made it difficult to dispatch

information, and to determine whether information was actually received by those for whom it was intended. Dkt. No. 77, at 88. Second, because employees wanted to talk only about "the replacement issue," considerable time had to be devoted to that issue alone, to the exclusion of other concerns. Id., at 89-90.

Union stability was also dealt a serious blow by the filing of six decertification petitions. Petitions were filed to decertify the unions at Haida Manor, Richland Manor, Mt. Lebanon Manor, Fayette Health Care Center, William Penn Nursing Center and Clarion Care Center. Pl. Exh. 26. Significantly, Haida Manor, Richland Manor, William Penn Nursing Center, and Fayette Health Care Center are facilities where employees have a low turnover rate and above-average seniority. Richland Manor and Fayette have historically shown strong union support. Dkt. no. 78, at 149-53.

The evidence also supports a conclusion that, to some extent, participation in certain union activities has declined. Dkt.no. 77, at 111, Pl. Exh. 29. Many of the union employees who actively participated in the April 1, 1996 strike have voiced their refusal to participate in a strike again. Dkt.no. 77, at 111.

The record is replete with various forms of pro-union literature. But this plethora of informational fliers and bulletins intended for union members is not a reliable indicator of the unions' strength. All that it demonstrates is the considerable effort exerted to maintain a positive outlook

in the wake of the strike and during the pendency of the unfair labor practice proceedings. In fact, much of the written material was generated by an additional union operative who was brought on board specifically to assist in bolstering union support and activity. Dkt.no. 78, at 212.

III. Standard for Issuance of Relief under § 10(j)

The temporary relief available under § 10(j)[2] requires a determination by the district court of "whether there is 'reasonable cause' to believe that an unfair labor practice has occurred and whether an injunction would be 'just and proper.'" Pascarell v. Vibra Screw, Inc. 904 F.2d 874, 877 (3d Cir. 1990)(citing Kobell v. Suburban Lines, 731 F.2d 1076, 1088-89 (3d Cir. 1984)). The reasonable cause inquiry in a § 10(j) proceeding necessitates a determination as to whether there is a substantial nonfrivolous legal theory and whether the facts construed in the light most favorable to the Board constitute sufficient evidence to support the asserted legal

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[2]Section 10(j) of the National Labor Relations Act (NLRA) provides in relevant part:

> (j) The Board shall have power, upon issuance of a complaint. . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, . . . for appropriate temporary relief or restraining order. Upon the filing of any such petition the court . . . shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

29 U.S.C § 160(j).

theory. 904 F.2d at 882 (citing 731 F.2d at 1084).

The Board's theory that Beverly has committed unfair labor practices prior to the April 1, 1996 strike is substantial and nonfrivolous because Beverly's conduct, if proven, would violate express statutory provisions precluding an employer from interfering with, restraining or coercing an employee in the exercise of his right to engage in concerted activity, 29 U.S.C. §158(a)(1). I have already determined that the Board's legal theory that the April 1, 1996 strike complied with the notice requirements of §8(g) was substantial and nonfrivolous. Dkt. 67. Accordingly, I need only determine if there are sufficient facts in the record to support the theory and if equitable relief is "just and proper."

IV. Factual Inquiry of Reasonable Cause Prong

The Board asserts that the evidence of record is more than enough to establish that there were unfair labor practices occurring at the various facilities and that the strikers were engaging in protected activity under the NLRA. During the arguments of counsel presented at the conclusion of the evidentiary hearing, I inquired whether this dispute boiled down to a question of whether relief would be "just and proper." Dkt. no. 80, at 480. Beverly's counsel replied: "I think predominantly so." Id. Counsel for Beverly also conceded during his closing argument that the evidence suggesting that the April, 1996 strike was a strike in protest of alleged unfair labor practices was strong. Id. Finally, he

conceded that he could not argue to the contrary when asked, by this court, if the evidence met the "pretty easy" test. Dkt.no. 80, at 482.

Beverly now contends in its Post-Hearing Brief that it "does not concede reasonable cause to believe the strike was an unfair practice strike." Dkt.no. 85, at 11. Beverly submits that "[a]lthough the union attempted to create the appearance that the strike was to protest alleged unfair labor practices, the evidence suggests that the unions' efforts were an elaborate pretext designed to avoid the consequences of an economic strike driven by bargaining considerations." Id.

Beverly's position fails to recognize that the Board need not prove that a violation occurred. As the Third Circuit instructs, such a determination is for the Board in the first instance. Hirsch v. Building & Const. Trades Council, Etc., 530 F.2d 298, 302 (3d Cir. 1976). The Board's burden of proof before the district court is "relatively insubstantial." 904 F.2d at 1084 (citing Hirsch, 530 F.2d at 302). The only question before me on this issue is whether some evidence is present demonstrating the elements of an unfair labor practice. 530 F.2d at 302. In determining whether there is sufficient evidence to support the Board's legal theory, the district court must accord considerable deference to the Bond on the facts. 731 F.2d at 882.

Based on this standard and the evidence of record, and viewed most favorably to the Board, I conclude that the Board has met its relatively insubstantial burden of presenting

evidence that would support not only the elements of the unfair labor practices prior to the strike, but also that the strike was in protest of the alleged unfair labor practices.

V. "Just and Proper" Prong

The standard to be applied by a district court in determining whether temporary relief pursuant to §10(j) is "just and proper" is less than clear. 731 F.2d at 1089. The Third Circuit has instructed that such a determination must be informed by the policies underlying § 10(j). Eisenberg v. Lenape Products, Inc., 781 F.2d 999, 1003 (3d Cir. 1986); Suburban Lines, 731 F.2d at 1090-91. "Congress sought to ensure that the Board would be able to exercise effectively its ultimate remedial power." Lenape Products, 781 F.2d at 1003. As a result, § 10(j) was designed to enable the Labor Board to vindicate its ultimate remedial power by affording limited interim relief in instances where the passage of time reasonably necessary to adjudicate the case on its merits convinced the Board and the federal courts that the failure to grant such relief might dissipate the effective exercise of such power." 731 F.2d at 1091. The focus, therefore, is not upon the "'egregiousness of the unfair labor practice but on the unusual likelihood . . . of ultimate remedial failure." Id., n. 26 (emphasis in original).

A consideration of the policies underlying § 10(j) necessitates a recognition of "the public interest implicit in protecting the collective bargaining process. . . ." 904 F.2d at

879. This is so because the purpose of § 10(j) is not to vindicate the interests of those employees who have allegedly been harmed by the unfair labor practices at issue, but to act in the public's interest. Id. at 876; Eisenberg v. Wellington Hall Nursing Home, 651 F.2d 902, 906-07 (3d Cir. 1981); Senate Report no. 105, 80th Cong., 1st Sess.8, 27 (1947). "The public interest at stake is the promot[ion of] wholesome and mutually acceptable labor relations and the settlement of labor disputes through collective bargaining between employees and their employer.'" 904 F.2d at 876 (quoting Eisenberg v. Hartz Mountain Corp., 519 F.2d 138, 142 (3d Cir. 1975)).

In applying these principles, a district court "should discuss and determine whether the failure to grant interim injunctive relief would be likely to prevent the Board, acting with reasonable expedition, from effectively exercising its ultimate remedial powers." 731 F.2d at 1091-92. Hence, "the critical determination is whether, absent an injunction, the Board's ability to facilitate peaceful management-labor negotiation will be impaired." 904 F.2d at 879 (emphasis added).

The degree of impairment that must be present to warrant injunctive relief under § 10(j) is not spelled out in the case law. But the analysis underlying a determination of whether granting §10(j) relief is appropriate begins with a consideration of the nature of the alleged unfair labor practices and their impact upon the collective bargaining

process. 904 F.2d at 878. This factual inquiry focuses upon "the likelihood of harm to the bargaining process in the interim." Wellington Hall, 651 F.2d at 907. "Unless there are circumstances, like the size, intimacy, and longevity of the bargaining unit, which indicate that the bargaining process will not be harmed, courts must be deferential to the Board's determination that the integrity of the process needs interim protection." 904 F.2d at 979 n.7.

The "likelihood of harm to the bargaining process" means that it is reasonable to expect under the facts of the case that there will be some adverse impact upon the process as a result of alleged unfair labor practices. Hartz Mountain, 519 F.2d at 142 (judicial action warranted under § 10(j) must be determined on a case by case basis). For example, in Wellington Hall 651 F.2d at 907, the court found that the discharge of eight employees in a small bargaining unit would in "all likelihood" undermine union support at a critical stage of the bargaining process. So too, in Pascarell, 904 F.2d at 880, the court reversed the district court's denial of interim relief finding that the discharge of four members of the bargaining committee of a recently certified union would jeopardize the union's ability to remain stalwart during the pendency of the administrative proceedings. Accordingly, the interim relief available under §10(j) is not limited to those instances where the collective bargaining process will be completely frustrated or defeated by the alleged unfair labor practices.

Third Circuit jurisprudence nonetheless cautions that the remedial relief available under § 10(j) is not always appropriate. If the harm from the alleged unfair labor practices, while theoretically damaging to the collective bargaining process, is in reality either of minimal consequence or outweighed by the resulting harm to the integrity of existing labor agreements, interim relief should be denied. For example, in Suburban Lines, 731 F.2d at 1076, the court recognized that § 10(j) relief may not be proper if the alleged unfair labor practice is against an established, "small and intimate" bargaining unit. In such a case, "if the alleged retaliation is against an established, 'small and intimate' bargaining unit, improper attempts by management to impair the collective bargaining process will have minimal 'chilling' effect because the employees will, most likely, be fully aware of their rights under the NLRA." 904 F.2d at 879 (citing 731 F.2d at 1093)(emphasis added). In Lenape Products, 781 F.2d at 999, the harm to the bargaining process was illusory because management was unaware of the organizational efforts of the employees and the discharge of certain individuals could not "interpreted by the employees as retaliation against union activity. See also 904 F.2d at 880 discussing Lenape Products.

In Hartz Mountain, 519 F.2d at 138, a § 10(j) injunction was reversed because the injunction actually did more harm than good to the collective bargaining process. There, the unfair labor practice was filed by a rejected union

after the employer subsequently recognized another union. The injunction restrained the employer from giving effect to the existing collective bargaining agreement which provided health and welfare benefits for the employees. The circuit court recognized that the temporary relief issued by the district court served to protect the rejected union against possible further erosion of employee support and insure that the competition between the labor unions would be fair. Nevertheless, it reversed the injunction. reasoning that the more important public interest was to insure the functioning of the existing collective bargaining agreement and the provision of the benefits it guaranteed. 519 F.2d at 142.

Beverly contends that this court should apply traditional equitable considerations in ruling upon the Board's request for § 10(j) injunctive relief, and follow the lead of several sister circuits that have abandoned the reasonable cause/just and proper inquiry. See Pye v. Sullivan, 38 F.3d 58 (1st Cir. 1994), Miller v. California Pac.Medical Center, 19 F.3d 449, 458 (9th Cir. 1994)(en banc); and Kinney v. Pioneer Press, 881 F.2d 485 (7th Cir. 1989). My reading of Third Circuit authority fails to reveal any inclination to abandon the reasonable cause/just and proper inquiry. In Suburban Lines 731 F.2d at 1078, the court specifically noted that interim relief under §10(j) may be granted "without the showing of irreparable harm and a likelihood of success on the merits, which are the ordinary requisities. . . ." Judge Aldisert's concurrence in Suburban Lines confirms that the

Third Circuit's analysis of the just and proper prong in a § 10(j) proceeding is distinguishable "from a request for a mine-run preliminary injunction [in] that the Regional Director, as the plaintiff, has a rather low threshold to meet his or her burden of proof. 731 F.2d at 1095. As a district court, I am not free to follow the lead of other courts of appeal when their jurisprudence on a point is at variance with Third Circuit decisions. Because I conclude that the reasonable cause/just and proper inquiry is alive and well in this circuit, I decline Beverly's invitation to replace it with traditional equity principles.

VI. Application of the Just and Proper Prong

As noted above, the "critical determination is whether, absent an injunction, the Board's ability to facilitate peaceful management-labor negotiation will be impaired." 904 F.2d at 879. I am satisfied that there is sufficient evidence to demonstrate that, without the issuance of an injunction, the Board's ultimate remedial powers may be frustrated. That, I conclude, constitutes the requisite impairment.

Beverly's alleged unfair labor practices have been selectively geared to destroy or at least impede the communication network among union members. By removing the bulletin boards and returning employees to different jobs and different shifts, Beverly has forced the union to recompose its infrastructure at each facility. Beverly's actions have prolonged the amount of time

necessary to disseminate information, and have tended to demoralize the union ranks and impede whatever collective bargaining has occurred.

The weakening of the communication network has had a substantial impact upon the morale of the union members. The pendency of six decertification petitions is persuasive evidence of this. The decertification petitions are significant because they have been filed at some of the nursing facilities with considerable longevity among employees and with traditionally strong union support. If decertification proceeds, the Board's ability to remedy any unfair labor practices may be completely undermined simply due to the nonunion status of these former union strongholds.

Accordingly, I conclude that interim relief under §10(j) should be granted.

VII. Single-Employer

The Board seeks a blanket injunction against all twenty Beverly nursing homes named in this suit. The Board asserts that such relief is appropriate because these twenty nursing home facilities constitute a "single-employer" under the Act. Dkt.no. 82, at 27. The Board submits that application of the single-employer theory to several entities in a § 10(j) injunction proceeding has been upheld by the Third Circuit. See Eisenberg v. Holland Rantos Co., 583 F.2d 100 (3d Cir. 1978). Beverly contends that a blanket injunction should not issue because the "'single employer' doctrine applies in

situations where two entities are performing the same function, but one has a collective bargaining relationship and the other does not." Dkt.no. 85, at 53. Beverly points out that there is no separate unrepresented entity in this case.

A "single employer" "exists where two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a 'single employer.'" NLRB v. Browning-Ferris Industries, Etc., 691 F.2d 1117, 1122 (3d Cir. 1982). This doctrine "is relevant to the determination that 'separate corporations are not what they appear to be, that in truth they are but divisions or departments of a single enterprise.'" Id. The determination of whether two or more business entities are sufficiently integrated to warrant unitary treatment requires consideration of four factors: (1) functional integration of operations; (2) centralized control of labor relations; (3) common management and (4) common ownership. Id.

One of the strongest indicators that the twenty nursing facilities are a single employer was Beverly's inclusion of each of the twenty nursing facilities as a party plaintiff in the Johnstown civil action initiated in an effort to stop the strike which commenced on April 1, 1996. See Beverly Enterprises - Pennsylvania, Inc., et. al. v. District 1199P, Service Employees International Union, AFL-CIO et. al. Civil Action no. 96-64J. Beverly owns each of the twenty facilities and Wayne Chapman, Beverly's vice-president of operations for the central and eastern part of Pennsylvania and New Jersey,

has total operational responsibility for these facilities. Dkt.no. 79, at 261-62. Mr. Chapman also had a hand in the contract negotiations for each of these facilities. Dkt.no. 79, at 267-68. Once the contracts at these twenty facilities expired, Mr. Chapman issued certain communications to the various facilities regarding the necessity of observing specific provisions in the expired contracts. See pl.exh. 2, 32.

These facts support the Board's assertion that the twenty nursing facilities constitute a single employer. The facilities, though managed separately at each site, are integrated in their overall management and labor relations. Their common ownership serves as a cohesive force presenting a unitary opponent to the unions. I conclude that treatment of Beverly as a single employer is appropriate to achieve and enforce the remedial relief warranted under § 10(i).

VIII. Appropriate Interim Relief

Where interim relief is appropriate under § 10(j), the relief that is granted should be based on a case by case determination of "what judicial action will be in the public interest." 731 F.2d at 1096 (J. Aldisert concurring)(citing Hartz Mountain, 519 F.2d at 142). Only that relief "reasonably necessary to preserve the ultimate remedial power of the Board" should be granted; §10(j) should not become the normal method for resolving labor disputes. 904 F.2d at 1091. Furthermore, any injunctive relief warranted

under § 10(j) "should include an explicit time limitation, not longer than six months, on the restraint it imposes." Hartz Mountain 519 F.2d at 144.

As indicated in section VI, relief is appropriate in light of the damage to the union's communication network at the various facilities. The most effective way of restoring that communication network is to reinstate the employees in the positions they held prior to the April 1, 1996 strike, and to return the bulletin boards at each facility.

Although the reinstatement of these employees is likely to be disruptive for Beverly, it should be no more disruptive than the original replacement of these workers after the strike. Third Circuit law instructs that "concern about protecting the employer from the harm from an injunction in the employee reinstatement context" is misplaced. Hartz Mountain, 651 F.2d at 906. The appropriate focus is upon "the likelihood of harm to the bargaining process in the interim." Id., at 907. In the absence of full reinstatement, the communication network of the unions at some of the facilities may be nonexistent when final adjudication by the Board is issued. By that time, the remedial power of the Board would be exercised too late.

ORDER

AND NOW, this day /s/ 4th of April 1997, consistent with the foregoing Memorandum, it is hereby

ORDERED and DIRECTED that the Petition for

Injunction Under § 10(j), docket no. 1 is GRANTED. Defendants, its officers, representatives, agents, servants and employees are directed to reinstate and maintain a bulletin board at each of the health care facilities for the use of the union personnel. Access to the union bulletin boards shall be made available forthwith, and in no event later than April 11, 1997. It is further ORDERED that defendants, its officers, representatives, agents, servants and employees shall offer full reinstatement to all employees who engaged in the unfair labor practice strike which began on April 1, 1996, said reinstatement to be to their former positions of employment, including reinstatement to their former scheduled and work stations, or, if these former positions no longer exist, to substantially equivalent positions, displacing, if necessary, any employees hired to replace said employees. Reinstatement shall commence forthwith, and be completed within thirty (30) days, that is on or before May 5, 1997. It is further

ORDERED that this case shall remain on the docket of this Court and, on compliance by respondent with its obligations undertaken hereto and upon disposition of the matters pending before the Board, the Petitioner shall cause this proceeding to be dismissed.

This Order shall expire six months from the date of its issuance; provided however, that Petitioner may, upon motion, request a thirty (30) day extension of this Order if it appears that the decision of the Board's administrative law

judge on the underlying unfair labor practice complaint in NLRB cases 6-CA-27873, et al., is imminent. Provided further, that after the issuance of said decision of the administrative law judge, upon motion of Petitioner, this Order may be extended, pending the Board's final decision, for an additional period not to exceed six months; provided further, that Petitioner may, upon motion, request an additional thirty (30) day extension of this Order if it appears that the final decision of the Board on the underlying unfair labor practice complaint is imminent.

BY THE COURT,

/s/ D. Brooks Smith
D. Brooks Smith
United States District Judge

cc:

Dalia Belinkoff Esq.
Julie Rose Stern, Esq.
JoAnn F. Dempler, Esq.
Terrence H. Murphy, Esq.
Michael J. Manzo, Esq.
Ronald A. Berlin, Esq.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

EVIDENCE

Defendant's Exhibit 2

SUMMARY - STRIKING EMPLOYEES
February 14,1997

Total No. of Striking Employees	750
No. of Striking Employees Returned	662
No. of Striking Employees Not Returned	84

* * *

No. of Nursing Homes With Fewer Than 5 Employees on Reinstatement List	10
No. of Nursing Homes With More Than 10 Employees on Reinstatement List	3

Defendant's Exhibit 3

UNITED PARCEL SERVICE

March 15,1996

Casey Wieczorek, Administrator
BEVERLY MANOR OF MONROEVILLE
4142 Monroeville Boulevard
Monroeville, Pennsylvania 15146

Dear Mr. Wieczorek:

I am writing to you on behalf of District 1199P, Service Employees International Union. AFL-CIO, CLC, regarding the bargaining units at Beverly Manor of Monroeville, Monroeville, Pennsylvania:

All full-time and part-time licensed practical nurses

Pursuant to the Taft-Hartley amendments, you are hereby notified that the aforesaid Union shall begin to engage in a strike, picketing and other concerted refusal to work activities to protest unfair labor practices committed by Beverly Health and Rehabilitation Services, Inc., and Beverly Manor of

Monroeville commencing at *7:00 AM on Friday, March 29, 1994 in Monroeville, Pennsylvania.*

Copies of this notice are hereby being sent, via United Parcel Service, to the Federal Mediation and Conciliation Service and the Pennsylvania Bureau of Mediation.

Sincerely,

/s/ Thomas V. DeBruin
Thomas V. DeBruin
President
[District 1199P]

Defendant's Exhibit 4

FAX COMMUNICATION: (412) 373-2435
and UNITED PARCEL SERVICE

March 27,1996

Casey Wieczorek, Administrator
BEVERLY MANOR OF MONROEVILLE
4142 Monroeville Boulevard
Monroeville, Pennsylvania 15146

Dear Mr. Wieczorek:

Please consider this letter as notification pursuant to the Taft-Hartley amendments that District 1199P, Service Employees International Union AFL-CIO CLC is hereby extending the 10-day notice whereby the Union shall engage in an unfair labor practice strike, picketing and other concerted refusal to work activities by seventy-one hours, from 7:00 AM March 20, 1996, until 6:00 AM Monday, April 1, 1996. The bargaining unit involved is the same as spelled out in the original 10-day notice dated March 15, 1996, as follows:

All full-time and part-time licensed practical nurses

Copies of this notice are hereby being sent, via United Parcel Service, to the Federal Mediation and Conciliation Service and the Pennsylvania, Bureau of Mediation.

Sincerely,

/s/ Thomas V. DeBruin
Thomas V. DeBruin
President
[District 1199P]

Defendant's Exhibit 5

Thomas V. DeBruin, President
District 1199P
1402 South Atherton Street
State College, PA 16801-6288

Re: Defective Strike Notice

Dear Mr. DeBruin:

Beverly Manor of Monroeville has received your letter of March 27. 1996. In it you advise that the facility should "[p]lease consider this letter as notification . . . that District 1199P . . . is hereby extending the 10-day notice whereby the Union shall engage in an unfair labor practice strike, picketing and other concerted refusal to work activities by seventy-one hour, from 7:00 AM March 29, 1996. until 6:00 AM Monday, April 1, 1996[]" for the bargaining unit described as 'All full-time and part-time service and maintenance employees".

This is to advise that we do not "consider [your] letter as notification", as you request. Instead, we conclude that it constitutes a new notice under Section 8(g) of the National Labor Relations Act ("Act"), and violates the terms of that section by failing to provide 10 days notice. Thus, we believe

that any strike, picketing and/or other concerted refusal to work activities conducted by the Union and/or its members, and/or other bargaining unit employees at the Union's behest, would be unlawful.

If the Union engages in any strike, picketing and/or other concerted refusal to work activities on April 1, 1996 (or at any other time) without compliance with the notice provisions of the Act, the facility will take all appropriate actions.

Sincerely,

/s/ Ellen
Ellen Weitz
Chief Negotiator

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

GERALD KOBELL, REGIONAL DIRECTOR FOR REGION SIX OF THE NATIONAL LABOR RELATIONS BOARD FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD, Petitioner	:	
-vs-	:	CIVIL NO: 96-1280
BEVERLY HEALTH AND REHABILITATION SERVICES, INC., et al., Respondent	:	

PROCEEDINGS: Injunction Hearing

BEFORE: Hon. D. Brooks Smith
Judge

DATE:	February 20, 1997 Afternoon Session 1:30 4:25 p.m.
PLACE:	Penn Traffic Building 319 Washington Street Johnstown, PA
REPORTED BY:	Maryann Cornelius Freelance Court Reporter Notary Public

* * * *

Court resolve this question as opposed to a Board with its acknowledged expertise in this area and expertise I deferred to notwithstanding the fact -- I want to say this, I wouldn't resolve the statutory interpretation issue the way the Board did. I don't read the statute that way, but the Board has and I believe that they're entitled to deference because of the special expertise that they have and because also, although I did not spell it out perhaps at quite the length I would have liked to, given the interest of time because the jurisprudence within this circuit is what it is with respect to legislative history and the legislative history was entitled to some deference there as well. So having granted that deference on the 8(g) issue why shouldn't I give deference here as well?

ATTORNEY ZAWATSKI: Well, Your Honor, obviously what we're seeking is interim. We're not asking the Court to finally rule on the ultimate determination of whether the various unfair labor practices have been committed by Respondent and what the remedy should be. We're asking for an interim relief pending the resolution by the Board. Unfortunately, Your Honor, the litigation process. . . .

* * * *

Supreme Court, U.S.
FILED
DEC 22 1998
OFFICE OF THE CLERK

(2)

No. 98-492

In the Supreme Court of the United States

OCTOBER TERM, 1998

BEVERLY HEALTH AND REHABILITATION SERVICES, INC., ET AL., PETITIONERS

v.

GERALD KOBELL, REGIONAL DIRECTOR FOR REGION SIX OF THE NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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64 pp

QUESTION PRESENTED

Whether the court of appeals erred in summarily affirming the district court's determination that the Regional Director of the National Labor Relations Board was entitled to interim injunctive relief, pursuant to Section 10(j) of the National Labor Relations Act, 29 U.S.C. 160(j), pending the Board's disposition of an administrative complaint against petitioners.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	22

TABLE OF AUTHORITIES

Cases:

Arlook v. *S. Lichtenberg & Co.*, 952 F.2d 367 (11th Cir. 1992)	10, 11
Asseo v. *Pan Am. Grain Co.*, 805 F.2d 23 (1st Cir. 1986)	16
Bio-Medical Applications, Inc., 240 N.L.R.B. 432 (1979)	6, 15, 18, 20
Boire v. *Pilot Freight Carriers, Inc.*, 515 F.2d 1185 (5th Cir. 1975), cert. denied, 426 U.S. 934 (1976)	10, 11
Bricklayers & Allied Craftsmen, Local 40 (Lake Shore Hosp.), 252 N.L.R.B. 252 (1980)	6
Brownlow v. *Schwartz*, 261 U.S. 216 (1923)	13
California Nurses Ass'n (City of Hope Nat'l Med. Ctr.), 315 N.L.R.B. 468 (1994)	6, 21
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	17
Danielson v. *Joint Bd. of Coat Garment Workers' Union*, 494 F.2d 1230 (2d Cir. 1974)	10, 17
Eisenberg v. *Lenape Prods., Inc.*, 781 F.2d 999 (3d Cir. 1986)	12
Fleischut v. *Nixon Detroit Diesel, Inc.*, 859 F.2d 26 (6th Cir. 1988)	11
Frye v. *Specialty Envelope, Inc.*, 10 F.3d 1221 (6th Cir. 1993)	10, 11
Hecht Co. v. *Bowles*, 321 U.S. 321 (1944)	12
Holly Farms Corp. v. *NLRB*, 517 U.S. 392 (1996)	19

Cases—Continued: Page

Kaynard v. *Mego Corp.*, 633 F.2d 1026 (2d Cir. 1980) 11
Kinney v. *Pioneer Press*, 881 F.2d 485 (7th Cir. 1989) 11, 17
Kobell v. *Suburban Lines, Inc.*, 731 F.2d 1076 (3d Cir. 1984) 5, 10, 11, 12
Lewis v. *New Orleans Clerks & Checkers*, 724 F.2d 1109 (5th Cir. 1984) 15
Local No. 8-6, Oil Workers Int'l Union v. *Missouri*, 361 U.S. 363 (1960) 13
Mastro Plastics Corp. v. *NLRB*, 350 U.S. 270 (1956) 20
McLeod v. *General Elec. Co.*, 385 U.S. 533 (1967) 14
Miller v. *California Pac. Med. Ctr.*, 19 F.3d 449 (9th Cir. 1994) 12, 16, 21
NLRB v. *Auciello Iron Works, Inc.*, 60 F.3d 24 (1st Cir. 1995), aff'd, 517 U.S. 781 (1996) 21
NLRB v. *Electro-Voice, Inc.*, 83 F.3d 1559 (7th Cir. 1996), cert. denied, 117 S. Ct. 683 (1997) 12, 16
NLRB v. *Washington Heights-West Harlem-Inwood Mental Health Council, Inc.*, 897 F.2d 1238 (2d Cir. 1990) 19
Pascarell v. *Vibra Screw Inc.*, 904 F.2d 874 (3d Cir. 1990) 4, 5
Pye v. *Sullivan Bros. Printers, Inc.*, 38 F.3d 58 (1st Cir. 1994) 16
Rivera-Vega v. *Conagra, Inc.*, 70 F.3d 153 (1st Cir. 1995) 10, 11-12
Silverman v. *Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054 (2d Cir. 1995) 11, 21
Tom Doherty Assocs., Inc. v. *Saban Entertainment, Inc.*, 60 F.3d 27 (2d Cir. 1995) 16
University of Texas v. *Camenisch*, 451 U.S. 390 (1981) 13, 21

Cases—Continued: Page

Weinberger v. *Romero-Barcelo*, 456 U.S. 305 (1982) 12

Statutes:

Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.* 12
National Labor Relations Act, 29 U.S.C. 151 *et seq.* 2
29 U.S.C. 158(a)(1) 3
29 U.S.C. 158(a)(3) 3
29 U.S.C. 158(g) 2
29 U.S.C. 160(j) 3, 4, 10

Miscellaneous:

Black's Law Dictionary (5th ed. 1979) 18
H.R. Rep. No. 1051, 93d Cong., 2d Sess. (1974) 20
S. Rep. No. 766, 93d Cong., 2d Sess. (1974) 20

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-492

BEVERLY HEALTH AND REHABILITATION SERVICES, INC., ET AL., PETITIONERS

v.

GERALD KOBELL, REGIONAL DIRECTOR FOR REGION SIX OF THE NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. B5-B7) is unpublished, but the judgment is noted at 142 F.3d 428 (Table). The opinion of the district court (Pet. App. C24-C47) is reported at 987 F. Supp. 409. An earlier opinion of the district court (Pet. App. C10-C23) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1998. A petition for rehearing was denied on July 2, 1998. Pet. App. B3-B4. The petition for a

writ of certiorari was filed on September 23, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Beverly Health and Rehabilitation Services, Inc. and Beverly Enterprises-Pennsylvania, Inc. operate twenty nursing homes in Pennsylvania. Pet. 1; Pet. App. C11.[1] The employees at those facilities are represented by locals of the Service Employees International Union (Union). Pet. App. C25 n.1. After the collective-bargaining agreements covering the facilities expired on November 30, 1995, petitioners and the union began negotiating new agreements; the employees continued to work as negotiations proceeded. *Id.* at C11.

The Union later filed unfair labor practice charges against petitioners with the National Labor Relations Board (Board). In particular, the Union alleged that, after the collective-bargaining agreements expired, petitioners (among other things) unilaterally changed the employees' terms and conditions of employment in violation of the National Labor Relations Act (Act), 29 U.S.C. 151 *et seq.* Pet. App. C11-C12. On March 15, 1996, the Union gave petitioners written notice, pursuant to Section 8(g) of the Act, 29 U.S.C. 158(g),[2] that

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[1] Each of the twenty facilities is also named as a petitioner before this Court. Pet. iii, 1. For purposes of this case, petitioners are treated collectively as a single employer. Pet. App. C10-C11, C44.

[2] In relevant part, Section 8(g) provides: "A labor organization before engaging in any strike * * * at any health care institution shall, not less than ten days prior to such action, notify the institution in writing * * * of that intention. * * * The notice shall state the date and time that such action will commence. The

it intended to commence an unfair labor practice strike at fifteen of the facilities on March 29, 1996, at 7:00 a.m. Pet. App. C12.

A strike did not begin, however, on March 29, 1996. Rather, on March 27, the Union notified petitioners in writing that it planned to delay the commencement of the strike by 71 hours, from March 29 at 7:00 a.m. to April 1 at 6:00 a.m. Pet. App. C12, C28. Petitioners advised the Union that, in their view, the Union's extension notice "failed to fulfill the literal statutory requirements set forth in §8(g)," and that they "would consider unlawful any strike held pursuant to the seventy-one hour extension notice." *Id.* at C13. The Union commenced a strike at the fifteen facilities on April 1 in any event. *Ibid.* The strike concluded on April 4, when the employees made petitioners an unconditional offer to return to work; petitioners, however, refused to reinstate many of the former strikers. *Id.* at C28-C29; see also *id.* at C13. The Union therefore filed further unfair labor practice charges with the Board in which they challenged petitioners' refusal to reinstate the former strikers.

2. a. Acting on the Union's charges, the Board's General Counsel issued a consolidated administrative complaint against petitioners on June 19, 1996. Pet. App. C14. The administrative complaint alleged, among other things, that petitioners violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), by failing to reinstate about 450 employees at the conclusion of the strike. App. A, *infra*, 2a-3a. On July 8, 1996, the Board's Regional Director filed a petition in federal district court under Section 10(j) of the Act, 29

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notice, once given, may be extended by the written agreement of both parties." 29 U.S.C. 158(g).

U.S.C. 160(j), which authorizes the Board to seek, and district courts to grant, such preliminary and interim injunctive relief as is "just and proper."[3] Pet. App. C14. Among other things, the Regional Director requested that the district court order petitioners to reinstate all employees who had unconditionally offered to return to work at the conclusion of the strike, pending the Board's adjudication of the unfair labor practice complaint. *Id.* at C11, C14-C15. One week later, on July 15, 1996, a hearing on the administrative complaint commenced before an administrative law judge (ALJ). App. A, *infra*, 1a.

b. On April 4, 1997, the district court granted the Regional Director's request for an interim injunction under Section 10(j). Pet. App. C24-C47; see also *id.* at C10-C23 (earlier unreported decision). The court explained that "[t]he temporary relief available under §10(j) requires a determination by the district court of 'whether there is reasonable cause to believe that an unfair labor practice has occurred and whether an injunction would be just and proper.'" Pet. App. C33 (quoting *Pascarell* v. *Vibra Screw Inc.*, 904 F.2d 874, 877 (3d Cir. 1990)) (internal quotation marks and footnote omitted). "Reasonable cause," the court noted, requires "a substantial, non-frivolous, legal theory, implicit or explicit, in the Board's argument," and, "taking

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[3] In relevant part, Section 10(j) provides: "The Board shall have power, upon issuance of a complaint * * * charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred * * *, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court * * * shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper." 29 U.S.C. 160(j).

the facts favorably to the Board * * * sufficient evidence to support that theory." Pet. App. C17 (quoting *Vibra Screw*, 904 F.2d at 882). To determine whether interim injunctive relief is "just and proper," the court further noted, "[t]he focus * * * is * * * 'on the *unusual* likelihood . . . of ultimate remedial failure'" of a Board order, absent an injunction. Pet. App. C36 (quoting *Kobell* v. *Suburban Lines, Inc.*, 731 F.2d 1076, 1091 n.26 (3d Cir. 1984)).

The court concluded that the Regional Director had satisfied the "reasonable cause" requirement for interim injunctive relief under Section 10(j). Pet. App. C19-C23, C34-C36. In particular, the court found that the Regional Director had "present[ed] evidence that would support not only the elements of the unfair labor practices prior to the strike, but also that the strike was in protest of the alleged unfair labor practices." *Id.* at C35-C36. Under settled law, the court noted, "unfair labor practice strikers * * * are entitled to immediate reinstatement upon making an unconditional offer to return to work." *Id.* at C21 n.3.

In making its "reasonable cause" finding, the court rejected petitioners' contention that, because "the notice extending the strike date for 71 hours was issued unilaterally" rather than with petitioners' agreement, the ensuing strike was not protected by the Act. Pet. App. C15-C16. Instead, the court concluded that "the Board's legal theory that the April 1, 1996 strike complied with the notice requirements of §8(g) [is] substantial and nonfrivolous." *Id.* at C34. In response to petitioners' contention that Section 8(g) bars extensions of strike notices except by written agreement between the parties, the court explained that (under long-standing Board precedent) written agreement is not the *exclusive* mechanism for extending strike notices.

Instead, the Board repeatedly had held that a union can unilaterally extend strike notices for a short time (*i.e.*, less than 72 hours), so long as the union also provides at least 12 hours of advance notice to the employer. *Id.* at C19-C20 (citing *Bio-Medical Applications, Inc.*, 240 N.L.R.B. 432 (1979)).[4] The district court saw no reason why the Board's construction of Section 8(g) should not be given deference, given the Board's expertise and the strong support for its construction in Section 8(g)'s legislative history. See Pet. App. D56 ("I believe that [the Board is] entitled to deference because of the special expertise that they have and because also * * * the legislative history was entitled to some deference there as well.").

The court also concluded that the Regional Director had satisfied the "just and proper" requirement for interim injunctive relief under Section 10(j). Pet. App. C36-C42, C44-C45. The Regional Director had presented "sufficient evidence to demonstrate that, without the issuance of an injunction, the Board's ultimate remedial powers may be frustrated." *Id.* at C41. Peti-

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[4] In *Bio-Medical*, the Board held that the language of Section 8(g) "does not expressly provide that a written agreement of the parties is the exclusive manner of extending an initial strike date," and that such a "restrictive interpretation" would be "clearly contrary to the expressed intent of Congress as revealed in the legislative history of Section 8(g)." 240 N.L.R.B. at 434. The Board held that a union may extend "the time set forth in the initial 10-day notice for the commencement of a strike by unilateral notification to the employer, at least in circumstances in which postponement of the strike is between 12 and 72 hours of the time set forth in that initial notice and where there is at least 12 hours advance notice given to the employer of the postponement." *Id.* at 435. See also *Bricklayers & Allied Craftsmen, Local 40 (Lake Shore Hosp.)*, 252 N.L.R.B. 252, 253 (1980); *California Nurses Ass'n (City of Hope Nat'l Med. Ctr.)*, 315 N.L.R.B. 468, 468 (1994).

tioners' alleged unfair labor practices, the court explained, had been "selectively geared to destroy or at least impede the communication network among [U]nion members"; the alleged violations "tended to * * * impede whatever collective bargaining has occurred"; and, "[i]n the absence of full reinstatement, the communication network of the [Union] at some of the facilities may be nonexistent when final adjudication by the Board is issued." *Id.* at C41-C42, C45.

Accordingly, the district court issued a Section 10(j) interim injunction requiring petitioners to "offer full reinstatement to all employees who engaged in the unfair labor practice strike which began on April 1, 1996, said reinstatement to be to their former positions of employment * * * displacing, if necessary, any employees hired to replace said employees." Pet. App. C46. The court specified that the order would "expire six months from the date of its issuance," *i.e.*, on October 4, 1997, but provided that the Regional Director could seek extensions as appropriate. *Id.* at C46-C47.

3. Petitioners appealed. On February 18, 1998, the court of appeals summarily affirmed the district court's issuance of the Section 10(j) injunction. Pet. App. B5-B7.

a. While the appeal was pending, on June 28, 1997, petitioners and the Union entered into new collective-bargaining agreements covering the employees at petitioners' facilities. The new contracts contain a provision entitled "Reinstatement Agreement," which states:

> Notwithstanding the pending litigation relating to the 1996 strike, or the term of this Agreement, the Employer agrees to complete the reinstatement of all strikers to their former positions prior to the

> strike, as required by the 10(j) injunction, regardless of the outcome of this litigation.

C.A. Supp. App. 1, 10 (reproduced at App. B, *infra*, 23a).[5]

b. On November 26, 1997—after the new collective bargaining agreements were signed, but before the appeal was decided—the ALJ assigned to the administrative proceedings instituted against petitioners issued his decision. App. A, *infra*, 1a-18a. The ALJ found that petitioners had committed "numerous and diverse unfair labor practices before the strike," and that "the strike was to protest those unfair labor practices." *Id.* at 7a. The ALJ thus concluded that petitioners "had an obligation under the Act immediately to reinstate the strikers to their former positions upon their unconditional offer to return to work," and that "their failure to do so constitutes an additional unfair labor practice." *Ibid.* (footnotes omitted).

The ALJ rejected petitioners' contention that, because "the Union's action in extending the [strike] deadline was taken unilaterally * * * the subsequent 3-day strike commencing on April 1 was unlawful." App. A, *infra*, 4a. Instead, he concluded that the Union's extension of the strike date was proper under *Bio-Medical*, *supra*, where the Board "adopt[ed] the 72-

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[5] The parties provided that the new contracts would become effective as to two particular bargaining units (the service and maintenance unit at Grandview Healthcare and the unit of licensed practical nurses at Mt. Lebanon Manor Convalescent Center) in the event that the Union prevailed on charges that petitioners unlawfully withdrew recognition from the Union as the representative of those employees. App. B, *infra*, 21a-22a. In the summer of 1997, the Regional Director issued administrative complaints against petitioners, based in part on those charges. The complaints are presently pending before an ALJ.

hour window and 12-hour advance notice rule as a parameter for allowing [unilateral] extensions of strike times previously announced in notices issued under Section 8(g)." App. A, *infra*, 5a; see also *id.* at 4a. The ALJ therefore ordered petitioners, among other things, "to offer immediate reinstatement to their former jobs to all employees who went on strike on April 1 * * * and to make them * * * whole for any loss of wages and other benefits." *Id.* at 8a.

On February 6, 1998, petitioners filed exceptions to the ALJ's decision with the Board. Petitioners' exceptions are currently pending before the Board.

c. During the pendency of the appeal, the Regional Director twice sought and obtained extensions of the interim relief entered by the district court under Section 10(j). App. C, *infra*, 24a-25a; App. D, *infra*, 26a-27a. After the second extension, the interim injunction was set to expire on May 4, 1998. Following the ALJ's issuance of his decision, the court of appeals' affirmance of the district court order, and petitioners' and the Union's agreements for reinstatement of striking workers, the Regional Director decided not to seek any further extension of the Section 10(j) interim injunction. Accordingly, on May 4, 1998, the injunction automatically expired, App. D, *infra*, 27a, and petitioners are no longer subject to its requirements.

ARGUMENT

Petitioners seek review of the court of appeals' order summarily affirming the district court's issuance of a Section 10(j) injunction. In particular, petitioners argue that courts of appeals have articulated different standards for determining whether such Section 10(j) injunctions should issue. See Pet. 6. But petitioners' challenge to the propriety of the district court's deci-

sion to issue an injunction in this case, and to the appropriateness of the standard that court employed, is largely academic and potentially moot. Moreover, because the interim injunction would have been proper under any standard, this case is not an appropriate vehicle for resolving the alleged conflict identified by petitioners. Accordingly, the petition for certiorari should be denied.

1. Section 10(j) of the National Labor Relations Act, 29 U.S.C. 160(j), "authorizes the NLRB to seek, and the United States district courts to grant, interim relief pending the NLRB's resolution of unfair labor practices." *Rivera-Vega* v. *Conagra, Inc.*, 70 F.3d 153, 158 (1st Cir. 1995). As petitioners point out, the courts of appeals have adopted somewhat different approaches to the determination of whether the Regional Director is entitled to a Section 10(j) injunction. Most courts (including the Third Circuit) follow a two-step inquiry. First, they determine whether the Regional Director has demonstrated "reasonable cause" to believe that the party against whom relief is sought has violated the Act; proof of "reasonable cause," the courts generally agree, includes a showing that the Regional Director's legal theories are "substantial and not frivolous."[6]

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[6] See *Kobell* v. *Suburban Lines*, 731 F.2d 1076, 1084 (3d Cir. 1984); *Frye* v. *Specialty Envelope, Inc.*, 10 F.3d 1221, 1225 (6th Cir. 1993) (per curiam); *Arlook* v. *S. Lichtenberg & Co.*, 952 F.2d 367, 371 (11th Cir. 1992); *Boire* v. *Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1188-1189 (5th Cir. 1975), cert. denied, 426 U.S. 934 (1976). Cf. *Danielson* v. *Joint Bd. of Coat Garment Workers' Union*, 494 F.2d 1230, 1244-1245 (2d Cir. 1974) (although district court's "duty of scrutiny" is not limited to determining whether Regional Director's claim is "insubstantial and frivolous," nonetheless, "on an issue of law, the district court should be hospitable to the views of the General Counsel however novel").

Second, the courts ask whether the Regional Director has shown that an injunction would be "just and proper" under the circumstances.[7] In making the "just and proper" inquiry, courts often ask (as the Third Circuit does) "whether the failure to grant interim injunctive relief would be likely to prevent the Board * * * from effectively exercising its ultimate remedial powers."[8] Some courts also require an inquiry into the traditional equitable factors governing the issuance of preliminary relief.[9]

Two courts of appeals have adopted a different verbal formula. They ask only whether relief is "just and proper," and do so by "evaluat[ing] the propriety of the [Regional] Director's request with an eye toward the traditional equitable principles that normally guide such an inquiry," *Kinney* v. *Pioneer Press*, 881 F.2d 485, 490 (7th Cir. 1989), *i.e.*, the Regional Director's "likelihood of success on the merits," "the potential for irreparable injury in the absence of relief," whether "such injury outweighs any harm preliminary injunctive relief would inflict on the employer" and whether "preliminary relief is in the public interest," *Conagra*,

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[7] See, *e.g.*, *Silverman* v. *Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054, 1059 (2d Cir. 1995); *Suburban Lines*, 731 F.2d at 1079; *Specialty Envelope*, 10 F.3d at 1224-1225; *S. Lichtenberg & Co.*, 952 F.2d at 372; *Pilot Freight Carriers*, 515 F.2d at 1188-1189.

[8] *Suburban Lines*, 731 F.2d at 1091-1092. See also *S. Lichtenberg & Co.*, 952 F.2d at 372; *Fleischut* v. *Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 30 (6th Cir. 1988).

[9] See *Conagra*, 70 F.3d at 164; *Kaynard* v. *Mego Corp.*, 633 F.2d 1026, 1033 (2d Cir. 1980). Cf. *Pilot Freight Carriers*, 515 F.2d at 1192-1193 ("though traditional rules of equity may not control the proper scope of §10(j) relief, some measure of equitable principles come into play")

70 F.3d at 164.[10] Although that formulation differs from the two-part "reasonable cause" and "just and proper" approach used by other courts, in practice the same result is often reached under either test.

2. Notwithstanding the different verbal formulae used by various appellate courts,[11] this case does not present a suitable vehicle for resolving any conflict that

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[10] See also *NLRB* v. *Electro-Voice, Inc.*, 83 F.3d 1559, 1566-1567 (7th Cir. 1996), cert. denied, 117 S. Ct. 683 (1997); *Miller* v. *California Pac. Med. Ctr.*, 19 F.3d 449, 456-461 (9th Cir. 1994) (en banc).

[11] Although we agree that the courts of appeals have used different verbal formulae, we do not agree with petitioners' further contention (Pet. 14-19) that the two-step framework used by the district court in this case is inconsistent with *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), and *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944). In *Romero-Barcelo*, this Court concluded that the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, does not "requir[e] a district court to issue an injunction for any and all statutory violations"; rather, the Court construed the statute "'in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings . . . in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect.'" 456 U.S. at 320 (quoting *Hecht Co.*, 321 U.S. at 330). In *Hecht Co.*, the Court reached a similar conclusion with respect to a federal emergency price control statute. See 321 U.S. at 328-330 ("A grant of *jurisidiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances."). Consistent with those holdings, the two-step framework applied by the district court does not *require* issuance of an injunction under Section 10(j) "for any and all statutory violations." *Romero-Barcelo*, 456 U.S. at 320. To the contrary, federal courts may deny interim relief if it is not "just and proper," such as where the Board cannot show that the absence of interim injunctive relief could potentially jeopardize its ability to offer a full and effective remedy for the violation. See, *e.g.*, *Eisenberg* v. *Lenape Prods., Inc.*, 781 F.2d 999, 1004-1005 (3d Cir. 1986); *Suburban Lines*, 731 F.2d at 1092-1094.

may exist. As an initial matter, the dispute petitioners seek to put before the Court is largely academic and potentially moot for two independent reasons.

First, on May 4, 1998, roughly ten weeks after the court of appeals issued its judgment order, the Section 10(j) interim injunction about which petitioners complain expired, and petitioners ceased to be subject to its terms. See p. 9, *supra*; App. D, *infra*, 27a. This Court has repeatedly recognized that, once an interim injunction expires, any appeal challenging its issuance becomes moot:

> The decision we are asked to review upheld only the validity of an injunction, an injunction that expired by its own terms [long ago]. Any judgment of ours at this late date "would be wholly ineffectual for want of a subject matter on which it could operate. An affirmance would ostensibly require something to be done which has already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain."

Local No. 8-6, Oil Workers Int'l Union v. *Missouri*, 361 U.S. 363, 371 (1960) (quoting *Brownlow* v. *Schwartz*, 261 U.S. 216, 217-218 (1923)); see also *University of Texas* v. *Camenisch*, 451 U.S. 390, 398 (1981) (appeal challenging standard under which preliminary injunction was issued is moot where the injunction had been "fully and irrevocably carried out").

Second, on June 28, 1997, petitioners and the Union negotiated a "Reinstatement Agreement" which requires petitioners to reinstate striking employees—under the same terms as the Section 10(j) injunction—

regardless of the outcome of this litigation. See pp. 7-8. *supra*; App. B, *infra*, 23a (agreement providing that petitioners will restore "all strikers to their former positions prior to the strike, as required by the 10(j) injunction, regardless of the outcome of this litigation"). That agreement renders the current dispute over the propriety of the preliminary injunction largely academic. And it renders further review inappropriate, as this Court recognized in *McLeod* v. *General Elec. Co.*, 385 U.S. 533 (1967) (per curiam). There, as here, the union and the employer had entered into a new collective bargaining agreement after the preliminary injunction had been issued. *Id.* at 535. There, this Court held that the new agreement was an intervening event that rendered further review of the Section 10(j) injunction inappropriate. See *ibid.* ("We do not think it appropriate, however, to decide * * * the proper construction of §10(j)" because "the company and [the union] agreed upon a three-year collective bargaining agreement to replace the expired contract."). The new collective bargaining agreements in this case likewise render further review inappropriate here.[12]

3. Even apart from the potential problem of mootness and the academic nature of the dispute, this case does not present an appropriate vehicle for articulating a standard to govern issuance of preliminary relief under Section 10(j), as the injunction in this case would have been proper under any standard. Cf. *General*

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[12] In *General Electric*, this Court vacated the court of appeals' judgment and remanded the case to the district court to "determine in the first instance the effect of this supervening event [*i.e.*, the new contract] upon the appropriateness of injunctive relief." 385 U.S. at 535. Here, no remand is required because the injunction has expired, and the Regional Director has not sought further interim relief.

Elec., 385 U.S. at 535 ("The controversy over the proper standard for [Section 10(j)] injunctive relief is immaterial if such relief is now improper whichever standard is applied.").

As discussed above, see pp. 4-7, 10-11, *supra*, the district court applied a two-step analytical framework. As part of the first step, the court concluded that the Regional Director had shown "reasonable cause" to believe a violation had occurred because, among other things, the Regional Director had articulated a "substantial and non-frivolous" legal theory in support of his contention that the Union's 71-hour extension of the original strike date was consistent with Section 8(g). See Pet. App. C15-C16, C19-C20, C23, C34. Indeed, that theory was a direct application of the Board's long-standing decision in *Bio-Medical Applications*, 240 N.L.R.B. 432 (1979), under which "a union's unilateral extension of a strike date within a 12 to 72 hour period does not constitute an unfair labor practice." Pet. App. C19-C20. The court's ruling was correct. See *Lewis* v. *New Orleans Clerks & Checkers*, 724 F.2d 1109, 1116 (5th Cir. 1984) (court "cannot deem the Regional Director's legal theory insubstantial or frivolous" where based on applicable Board precedent).

a. Nonetheless, petitioners argue that, "[i]f the District Court had been free to apply the four-part test that it customarily would use for injunction cases, the District Court plainly would have concluded that the Board's legal theory was not likely to prevail on the merits," and therefore would have declined to issue a Section 10(j) injunction in this case. See Pet. 12. That contention lacks merit.

As an initial matter, the "likelihood of success on the merits" factor as it has been applied in this context does not materially differ from the "substantial and non-

frivolous" inquiry made by the district court in this case. See, *e.g.*, *NLRB* v. *Electro-Voice, Inc.*, 83 F.3d 1559, 1568 (7th Cir. 1996) ("some likelihood of succeeding on the merits" means "a better than negligible chance of winning") (internal quotation marks omitted), cert. denied, 117 S. Ct. 683 (1997); *Miller* v. *California Pac. Med. Ctr.*, 19 F.3d 449, 460 (9th Cir. 1994) (en banc) (Board "can make a threshold showing of likelihood of success by producing * * * an arguable legal theory").[13] Petitioners are thus incorrect to assert that

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[13] *Pye* v. *Sullivan Bros. Printers, Inc.*, 38 F.3d 58 (1st Cir. 1994) (Pet. 10 n.5) is not apposite here. In *Sullivan Brothers*, the court stated that "[w]hen * * * the interim relief sought by the Board is essentially the final relief sought, the likelihood of success should be *strong*." 38 F.3d at 63 (internal quotation marks omitted). In this case, however, the interim relief ordered by the district court (reinstatement of the strikers) is not essentially the final relief sought by the General Counsel in the Board proceeding. See App. A, *infra*, 13a, 17a (ALJ's order requires petitioners, among other things, not only to reinstate the strikers, but also to "make them whole * * * for any loss of earnings and other benefits"; to rescind "all unilateral actions * * * found to have been effected in violation of collective bargaining obligations"; and "[to] make any employee adversely affected by those actions * * * whole for any loss of earnings and other benefits"). Moreover, the use of a "heightened standard" in preliminary injunction cases "must be supplemented by a further requirement that the effect of the order, once complied with, cannot be undone." *Tom Doherty Assocs., Inc.* v. *Saban Entertainment, Inc.*, 60 F.3d 27, 35 (2d Cir. 1995). The First Circuit itself has recognized that a Section 10(j) reinstatement order does not have such an effect. See *Asseo* v. *Pan Am. Grain Co.*, 805 F.2d 23, 28 (1986) (employer's "burden" of interim reinstatement "will only last until the Board's final determination").

looking to the Board's "likelihood of success on the merits" would have altered the result in this case.[14]

To the extent petitioners argue that the district court concluded otherwise and ruled that the Regional Director in fact was not likely to succeed, see Pet. 11-12, petitioners misread the district court. As explained above, the Board has consistently read Section 8(g) as permitting strike notices to be extended not only by mutual agreement of the parties, but also by unions acting unilaterally so long as the extension is brief (less than 72 hours) and sufficient notice is given. See pp. 5-6 & n.4, 8-9, *supra*; see also pp. 18-20, *infra*. Relying on the district court's assertion (made from the bench) that it would not itself have read Section 8(g) that way in the first instance, petitioners argue that the district court was unwilling to accept the Board's theory as a likely candidate for success. See Pet. 11 (quoting Pet. App. D56). But the district court's further discussion reveals that, even if the district court might have interpreted Section 8(g) differently *absent* guidance from the Board, it nonetheless recognized that (under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)) the Board's interpretation is entitled to deference and must be upheld so

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[14] Moreover, the "likelihood of success on the merits" inquiry has been described as an evaluation of "the probability that the General Counsel will succeed in convincing *the NLRB* that someone has in fact violated the labor laws." *Pioneer Press*, 881 F.2d at 491 (emphasis added). On that view, it is clear that the Regional Director was entitled to a Section 10(j) injunction in this case, for his legal theory in respect to the Section 8(g) issue was based on a direct application of long-standing Board precedent. Cf. *Danielson*, 494 F.2d at 1244 (describing inquiry as whether there is "some significant possibility that the Board will enter an enforceable order").

long as it constitutes a permissible construction of the statute; and the district court further noted that the Board's construction was strongly supported by Section 8(g)'s legislative history. Pet. App. D56 ("I believe that [the Board is] entitled to deference because of the special expertise that they have and because also * * * the legislative history was entitled to some deference there as well."). Thus, far from demonstrating that the district court believed the Board's construction of Section 8(g) to be an unlikely candidate for success, that court's comments reveal its unwillingness to overturn the Board's permissible construction of the statute.

b. For similar reasons, petitioners' assertion (Pet. 19) that the Regional Director's legal theory was "groundless"—and thus an improper basis for an injunction under any standard—is incorrect. According to petitioners, Section 8(g) cannot be permissibly construed as permitting unilateral extensions under *any* circumstances because "Congress specifically mandated in Section 8(g) that any extension of a strike notice be done through the written agreement of both parties." Pet. 20.

Petitioners' construction of Section 8(g) rests on the mistaken premise that the mechanism for extending strike notices given by Section 8(g)—joint agreement—is *exclusive*. The statute nowhere declares that to be the case. See *Bio-Medical*, 240 N.L.R.B. at 434 ("[T]he cited language does not expressly provide that a written agreement of the parties is the exclusive manner of extending an initial strike date."). Instead, Section 8(g) merely provides that "[t]he notice, once given, may be extended by the written agreement of both parties." The word "may" expresses "ability, competency, liberty, permission, [or] possibility." *Black's Law Dictionary* 883 (5th ed. 1979). It does not nec-

essarily exclude the possibility that the notice may be extended by other means as well. Thus, petitioners do not ask that Section 8(g) be read as written, but rather ask that it be rewritten to declare that "the notice, once given, may be extended, but *only* by the written agreement of both parties." Even if that is a plausible construction of Section 8(g), it is not an inevitable one; consequently, it cannot displace the Board's contrary interpretation. See *Holly Farms Corp.* v. *NLRB*, 517 U.S. 392, 401 (1996) (rejecting employer's "plain language" argument that offered "a plausible, but not an inevitable, construction" of statute).[15] Indeed, imposing such a restrictive construction on Section 8(g)—and thus constricting by implication the conditions under which employees may strike—would be particularly inappropriate given the principle that "any limitation on the employees' right to strike against [unfair labor practices] * * * must be * * * explicit and clear."

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[15] *NLRB* v. *Washington Heights-West Harlem-Inwood Mental Health Council, Inc.*, 897 F.2d 1238 (2d Cir. 1990), discussed by petitioners at Pet. 26-29, has little bearing on the instant case. As petitioners acknowledge (Pet. 28), the court there "found it unnecessary * * * to directly rule on the Board's construction" of Section 8(g). See 897 F.2d at 1246-1247 (finding ineffective union's attempt to unilaterally extend strike date because it was not "in written form" and, in any event, "did not provide twelve-hour supplementary notice of the time of day that the strike would begin"). Nor is there "significan[ce]" (Pet. 28) to that court's discussion of whether certain types of unfair labor practice strikes are exempt from Section 8(g). The court expressly declined to resolve that issue, see 897 F.2d at 1248, and, in any event, the Regional Director did not rely on such a theory in seeking Section 10(j) relief against petitioners in this case.

Mastro Plastics Corp. v. *NLRB*, 350 U.S. 270, 287 (1956).[16]

Moreover, the legislative history of Section 8(g) confirms the correctness of the Board's longstanding construction. Both the Senate and House Reports accompanying the bills that became Section 8(g) made it clear that it was not Congress's intention that unions "be required to commence a strike or picketing at the precise time specified in the notice." S. Rep. No. 766, 93d Cong., 2d Sess. 4 (1974); H.R. Rep. No. 1051, 93d Cong., 2d Sess. 5 (1974). To the contrary, the House and Senate Reports expressly indicate that it would be permissible for a union to delay its strike by up to 72 hours, so long as "12 hours notice [is] given of the actual time for commencement of the action." S. Rep. No. 766, *supra*, at 4; H.R. Rep. No. 1051, *supra*, at 5; see also *Bio-Medical*, 240 N.L.R.B. at 434-435 (citing and quoting additional legislative materials). Petitioners nowhere dispute that these legislative materials support the Board's construction;[17] nor do they offer a persuasive reason for rejecting the Board's construc-

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[16] In addition, because a strike that does not comply with Section 8(g) "deprive[s] the strikers of their status as employees," *Bio-Medical*, 240 N.L.R.B. at 435-436, it is reasonable for the Board to construe the statute in a fashion that avoids such an "unwarrantedly harsh result," *id.* at 436, absent a contrary statutory directive.

[17] Petitioners do argue that the Board should not have consulted the legislative history because Section 8(g) itself is unambiguous with respect to extensions of strike dates. See Pet. 23. However, as shown in the text above, see pp. 18-19, *supra*, Section 8(g) by no means declares that agreement of the parties is the *exclusive* method for extending a strike notice. And where the statutory language has an element of ambiguity, an agency's "consideration of relevant legislative history" is proper. *Mastro Plastics Corp.*, 350 U.S. at 287.

tion and adopting one that directly conflicts with Section 8(g)'s legislative history.[18]

c. Besides, the correctness of the Board's construction of Section 8(g) is not properly before this Court. Where a court passes on a Section 10(j) injunction, the question is not whether the Board has correctly construed the statute that Congress directed it to administer; that question may be determined only on review of the Board's final orders. Instead, the question is whether the Board's construction is sufficiently plausible to support interim relief. *California Pac. Med. Ctr.*, 19 F.3d at 460; see also *Silverman* v. *Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054, 1059 (2d Cir. 1995) (question is whether Board's legal theory is "fatally flawed"); Pet. App. C22-C23; 29 U.S.C. 160(e) and (f); *NLRB* v. *Auciello Iron Works, Inc.*, 60 F.3d 24 (1st Cir. 1995), aff'd, 517 U.S. 781 (1996). For that reason, this Court has in the past expressly declined to reach the merits of a case on review of a preliminary injunction. See *Camenisch*, 451 U.S. at 394-398. Here, there can be no doubt that the Board's reading of Section 8(g)—given the deference owed to the Board, and the legislative history's strong support

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[18] Petitioners' further suggestion (Pet. 22) that the Board's interpretation of Section 8(g) renders the statutory language "completely superfluous" and "meaningless" is wide of the mark. The Board's construction fully preserves mutual written agreement as the basic method by which an initial strike date may be extended; it merely affords an additional mechanism through which the strike date may be extended, but only for a very short period (up to 72 hours) and only when there is sufficient notice to the employer. If the union desires an extension in excess of 72 hours, it must either obtain the employer's written consent or, if consent is withheld, issue a new 10-day strike notice. See *California Nurses Ass'n*, 315 N.L.R.B. at 468.

for the Board's construction—more than meets the threshold requirement of sufficient plausibility.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

DECEMBER 1998

APPENDIX A

[Excerpts from decision of Administrative Law Judge]

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CASE 6-CA-27873, ET AL.

BEVERLY HEALTH AND REHABILITATION SERVICES, INC., ITS OPERATING REGIONAL OFFICES, WHOLLY OWNED SUBSIDIARIES AND INDIVIDUAL FACILITIES AND EACH OF THEM, AND/OR ITS WHOLLY OWNED SUBSIDIARY BEVERLY ENTERPRISES—PENNSYLVANIA, INC., D/B/A BEVERLY MANOR OF MONROEVILLE, ET AL.

AND

DISTRICT 1199P, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC, ET AL.

DECISION

Statement of the Case

Robert T. Wallace, Administrative Law Judge: These cases were tried at 6 locations in Pennsylvania (Scranton, Franklin, Harrisburg, Pittsburgh, Johnstown and Reading) on 20 days between July 15, 1996 and May 6, 1997.

The original charge was filed on February 13, 1996[1] by District 1199P, Service Employees International Union, AFL-CIO, CLC. Thereafter numerous additional charges[2] were filed by that union and by two other SEIU affiliated unions (Local 585 and Local 668). A Consolidated Complaint against the captioned Respondents issued on May 9 and this was succeeded on June 19 by an Amended Consolidated Complaint, and the latter was amended up to and through conclusion of hearings.[3]

At issue is whether Respondents violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act by unilaterally changing terms and conditions of employment, by: refusing the Unions' information requests, refusing to bargain over specific issues, delaying grievance processing, and by-passing the Locals and dealing directly with employees. Also, there are numerous allegations of coercive and discriminatory conduct

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[1] All dates are in 1996 unless otherwise indicated.

[2] 6—CA-28061, 28073, 27874, 28046, 28075, 28049, 28074, 27876, 28013, 28050, 27877, 28014, 28015, 27878, 28020, 28054, 27879, 28019, 28047, 27880, 28023, 28045, 27881, 28024, 28057, 27882, 28025, 28052, 27883, 28026, 28051, 27884, 28058, 28076, 27889, 28012, 28059, 27890, 28048, 27891, 27892, 28060, 28077, 27893, 28079, 27894, 28053 and 28081.

[3] In its brief General Counsel seeks further to amend the complaint to delete paragraph G6 and to include 4 additional charges. Respondents opposed the latter. The requested deletion is granted. Inclusion of additional charges is denied. No adequate reason is advanced as to why inclusion was not sought before close of the hearing. Failure to do so precluded Respondents from responding either at trial or on brief. In any event, procedural fairness would require reopening for that purpose and I see no compelling need for the attendant delay in disposition of these proceedings. *United Artists Theater*, 277 NLRB 115, 130 (1985).

in violation of Section 8(a)(1) and (3) of the Act, including failing promptly to reinstate approximately 450 employees who engaged in a three day strike beginning on April 1.

* * * * *

VII. Sufficiency of Strike Notices Under Section 8(g)

Section 8(g) was added to the Act in 1974 as part of the Nonprofit Hospital Amendments that extended coverage to include health care institutions. It provides, *inter alia*, that a union must give 10 days written notice of a strike against such institutions. The 10-day notice, according to Congressional Committees sponsoring the legislations,[63] was intended to give them sufficient advance notice of a strike or picketing to permit timely arrangements for continuity of patient care.

In this case, the Unions on March 14 and 15 sent to administrators of 15 of the involved nursing homes[64] and the Federal Mediation and Conciliation Service notices advising that a strike would occur at those facilities on March 29. It is conceded that those notices fully comply with Section 8(g).

On March 27, however, other letters were sent to the same addressees advising that the Unions had extended the strike deadline by 72 hours, from 7:00 a.m. March 29 to 6:00 a.m. Monday, April 1. Respondents contend that the extension of the strike notices does not comply with "clear and unambiguous language" in the

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[63] S. Rept 93-766, 93d Cong., 2d Sess. at 4; H. Rept. 93-1051, 93d Cong., 2d Sess. at 5.

[64] Monroeville, Clarion, Fayette, Franklin, Haida, Meadville, Meyersdale, Mt. Lebanon, Murray, Richland, William Penn, Reading, Lancaster, Caledonia and Carpenter.

concluding sentence of Section 8(g), to wit: "The notice, once given, may be extended by the written agreement of both parties." Since, admittedly, the Unions' action in extending the deadline was taken unilaterally, Respondent's argue that the subsequent 3-day strike commencing on April 1 was unlawful and, consequently, that they were under no constraint to take back the approximate 450 employees who participated—even assuming the strike was in protest against unfair labor practices.

That precise issue was presented and resolved in the "*Bio-Medical*" case, *Greater New Orleans Artificial Kidney Center*. 240 NLRB 432 (1979). There the Board, after citing the following language in the Congressional Committee Reports:[65]

> It is not the intention of the Committee that a labor organization shall be required to commence a strike or picketing at the precise time specified in the notice; on the other hand, it would be inconsistent with the Committee's intent if a labor organization failed to act within a reasonable time after the time specified in the notice. Thus, it would be unreasonable, in the Committee's judgment, if a strike or picketing commenced more than 72 hours after the time specified in the notice. In addition, since the purpose of the notice is to give a health care institution advance notice of the actual commencement of a strike or picketing, if a labor organization does not strike at the time specified in the notice, at least 12 hours notice should be given of the actual time for commencement of the action . . .

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[65] *Ibid*, fn. 63.

went on to adopt the 72-hour window and 12-hour advance notice rule as a parameter for allowing extensions of strike times previously announced in notices issued under Section 8(g). In this regard, it held that the rule established a reasonable "substantial compliance" standard needed to avoid an application of Section 8(g) that would produce "an unwarrantedly harsh result [i.e. depriving strikers of protected status] not intended by the Congress."

The *Bio-Medical* precedent has been uniformly followed by the Board since 1979. *District 1199-E National Union of Hospital and Health Care Employees (Federal Hill Nursing Center, Inc.)*, 243 NLRB 23 (1979); *Bricklayers & Allied Craftsmen, (Lake Shore Hospital)*, 252 NLRB 252 (1980); *Nurses Ana (City of Hope)*, 315 NLRB 468 (1994).

In light of the clear and consistent precedent set by *Bio-Medical* and its progeny, any change of interpretation in this area is matter for Board determination; and Respondents' recourse is at that level. *Iowa Beef Packers, supra.* Applying existing policy, I find that the extensions of the strike notices satisfied the requirements of Section 8(g).

VIII. Nature of the Strike

At each of the 15 homes that experienced a strike, issuance of the strike notice and the decision to strike were put to separate votes at meetings conducted by the Union representatives. At these meetings, the Union representatives enumerated the various perceived unfair labor practices at the facility, and in many cases, apprised the members of similar unfair labor practices occurring at other facilities as well. The Union representatives clearly informed the bargaining

unit members that the vote was being undertaken to protest Respondents' unfair labor practices. It was made clear to members that the strike was not in furtherance of the Unions' demands in contract negotiations. The testimony of the Union representatives conducting the meetings at each facility as well as the testimony of corroborating employee witnesses attending meetings at each facility is consistent and credible. It clearly establishes that the employees voted to strike in protest against persistent and numerous unfair labor practices which, on this record are shown to have occurred at each of the 15 facilities.

Further, in addition to striking over Respondent's unfair labor practices in their own facilities, the employees struck in sympathy over unfair labor practices at the 5 other facilities operated by Respondents. That aspect of the strike is also protected under the Act. *C. K. Smith & Co., Inc.*, 227 NLRB 1061, 1072 (1977), enf'd. 569 F.2d 162, 165-166 (1st Cir. 1977).

Respondents were well aware the strikers were protesting unfair labor practices. In their notices, the Unions characterized the strike as an unfair labor practice strike; and through picket signs and public statements, the Unions and striking employees amply conveyed that they were engaged in an unfair labor practice strike.[66]

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[66] The local Unions had supported a "Dignity" campaign that made general contract demands for all nursing home workers in Pennsylvania, including those employed at Respondent facilities as well as other facilities owned by entities unrelated to Respondent. Literature and T-shirts supporting the Dignity campaign had the logo "one contract, one fight." The fact that some Union members wore such T-shirts to Union meetings or even on the picket line,

It is well settled that a strike is considered to be an unfair labor practice strike as long as one of its objectives is to protest unfair labor practices. *Kosher Plaza Supermarket*, 313 NLRB 74, 88 (1993); *R & H Coal Co.*, 309 NLRB 28 (1992); *Northern Wire Corp.*, 291 NLRB 727, fn. 4 (1988), enfd. 887 F.2d 1313 (7th Cir. 1989). This being the case, the fact that frustration over the slow progress of contract negotiations may have played a part in the strike vote lacks significance.

Having established that that Respondent committed the numerous and diverse unfair labor practices before the strike and, further, that the strike was to protest those unfair labor practices, it follows that Respondents had an obligation under the Act immediately to reinstate the strikers to their former positions upon their unconditional offer to return to work[67] and that their failure to do so constitutes an additional unfair labor practice.[68] *Teledyne Still-Man*, 298 NLRB 982, 985

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albeit under coats, jackets and rain gear, does not transform what was clearly an unfair labor practice strike into an economic strike.

[67] Respondents stipulated there was an unconditional offer to return to work on behalf of every striker. (Tr. 221)

[68] At the conclusion of the strike, about 350 former strikers were completely denied reinstatement and an additional 100 were not reinstated to their former positions at 15 facilities based upon Respondents' claim that it had a right to and did permanently replace the strikers. After the strike, Respondent continued to reinstate former strikers only as positions became available, without regard to placing them in their former classification, department, number of hours or shift. Typically, a former striker was first offered reinstatement as a casual (on call) or part-time employee and only later, if at all, offered a full-time position. As casual or part-time employees, many former strikers lost their health insurance and other contractual benefits. In January 1997, 11 months after the three day strike, 66 former strikers still had not been offered reinstatement in any capacity and 237 former

(1990); *American Gypsum Co.*, 285 NLRB 100 (1987). It is a violation of Section 8(a)(3) of the Act to fail to reinstate such strikers. *Radio Electric Service Co.*, 278 NLRB 531, 535 (1986). See also *NLRB v. Cast Optics Corp.*, 458 F.2d 398, 407-408 (3rd Cir.), cert. denied 409 U.S. 850 (1972); *Grondorf, Field, Black & Co.*, 318 NLRB 996 (1995); *Orit Corp.*, 294 NLRB 695, 699 (1989); *Accurate Die Casting Co.*, 292 NLRB 284 (1989).

* * * * *

Remedy

Having found that the named Respondents have engaged in unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

* * * * *

Among other things, BHRI and BE-P will be ordered to offer immediate reinstatement to their former jobs all employees who went on strike on April 1 as well as employees (Sharon Proper, Diane McNulty and Sara Sharbaugh) found to have been discriminatorily discharged, and to make them and other employees found to have been wrongfully suspended (Connie Kollar) or otherwise deprived of income, whole for any loss of wages and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950),

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strikers who were not reinstated to the positions they held before the strike. In addition, other former strikers were offered reinstatement to positions that were not their former positions and which were, for various reasons, unacceptable.

plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Because of the Respondents' wide-ranging and persistent misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring them to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

Disposition

On these findings of fact and conclusions of law and on the entire record, I issue the following two recommended Orders[69]

ORDER
(BE-P)

Respondent Beverly Enterprises—Pennsylvania, Inc. (BE-P), of Leesburg, Virginia, its officers, agents, successors, and assigns, at the following nursing homes in Pennsylvania: Beverly Manor of Monroeville, Clarion Care Center, Fayette Health Care (Uniontown), Franklin Care Center (Waynesburg), Grandview Health Care (Oil City), Haida Manor (Hastings), Meadville Care Center, Meyersdale Manor, Richland Manor (Johnstown), Beverly Manor of Reading (Mt./Penn), Caledonia Manor (Fayettsville), Camp Hill Care Center, Carpenter Care Center (Tunkhannock), York Terrace Nursing Center (Pottsville), shall:

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[69] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Failing to reinstate unfair labor practice strikers immediately upon receipt of their unconditional offer to return to work.

(b) Ceasing to allow union representatives access to the above facilities as required under provisions of a collective bargaining agreement.

(c) Ceasing to allow posting of union-related notices on bulletin boards in those facilities as required under provisions of a collective bargaining agreement.

(d) Adopting a health insurance plan for employees without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(e) Reducing employees' hours of work and overtime opportunities without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(d) Laying off employees without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(e) Eliminating unit positions and assigning unit work to non-unit employees without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(f) Requiring employees to work overtime and, for some, eliminating opportunities for voluntary overtime without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(g) Failing to give employees' bargaining representatives adequate prior notice and opportunity for bargaining before changing contractual terms and conditions of employment, including: work schedules and advance posting requirements with respect thereto, absentee policies, the period required for doctor certification of absences for illness, rules relative to vacation scheduling and duration, and job descriptions.

(h) Failing to honor union bargaining requests.

(i) Bypassing appropriate union representative and dealing directly with unit employees.

(j) Failing to comply with union requests for information relevant and necessary for collective bargaining.

(k) Failing to process grievances in a timely manner.

(l) Engaging in and threatening unlawful surveillance of employees' union activities.

(m) Threatening employees with discipline and discharge for supporting unions and for complaining about working conditions.

(n) Threatening to grant wage increases to replacement workers in the event of a strike.

(o) Soliciting and impliedly promising to remedy employee grievances.

(p) Disparaging employees from engaging in the protected concerted action of protesting perceived

unfair working conditions by calling them "assholes and fucking idiots."

(q) Prohibiting employees from leaving union literature in the breakroom and prematurely removing it therefrom and from selling union insignia at offduty times in the breakroom.

(r) Suspending employee Connie Kollar for urging other employees to support the union.

(s) Changing the job description of unionized Licensed Practical Nurses (LPNs) without affording to their bargaining representative adequate prior notice and opportunity for bargaining, and for discriminatory reasons.

(t) Refusing to respond to an information request of the union relative to the changes in LPN status and refusing to bargain and dealing directly with LPNs about the changes.

(u) Changing LPN work and vacation schedules without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(v) Refusing to allow a duly selected employee union representative to attend an [*sic*] a labor-management meeting.

(w) Reducing the working hours of employee Beverly Higbee for engaging in union activities.

(x) Discharging LPNs Sharon Proper, Diane McNulty and Sara Sharbaugh for actively supporting unionization and to deter others from doing so.

(y) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order offer full reinstatement to their former jobs Sharon Proper, Diane McNulty and Sara Sharbaugh as well as all employees who participated in the unfair labor practice strike which commenced on April 1, 1996 without prejudice to their seniority or any other rights or privileges previously enjoyed; and make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the Remedy section of the decision.

(b) On request, rescind all unilateral actions here found to have been effected in violation of collective bargaining obligations and make any employee adversely affected by those actions, or by unlawful discriminations, whole for any loss of earnings and other benefits suffered as a result thereof in the manner set forth in the Remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and the suspension of Connie Kollar and within 3 days thereafter notify the employees in writing that this has been done and that the discharges/suspension will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examina-

tion and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at the nursing homes named above copies of the attached notice marked "Appendix."[70] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found in relation to this Respondent

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[70] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Issues concerning whether remedies should extend to any or all of the interrelated Beverly companies, including Respondents BHRI and BE-P, because of asserted common responsibility for the unfair labor practices, are hereby severed and reserved for resolution by me in a separate supplemental proceeding.

ORDER
(BHRI)

Respondent Beverly Health and Rehabilitation Services, Inc. (BHRI), of Ft. Smith, Arkansas, its officers, agents, successors, and assigns, at the following nursing homes in Pennsylvania: Mt. Lebanon Manor, Murray Manor (Murrysville), William Penn (Lewistown), Beverly Manor of Lancaster, Blue Ridge Haven Convalescent Center (Camp Hill), and Stroud Manor (Stroudsburg), shall:

1. Cease and desist from

(a) Failing to reinstate unfair labor practice strikers immediately upon receipt of their unconditional offer to return to work.

(b) Ceasing to allow union representatives access to the above facilities as required under provisions of a collective bargaining agreement.

(c) Ceasing to allow posting of union-related notices on bulletin boards in those facilities as required under provisions of a collective bargaining agreement.

(d) Laying off employees without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(e) Reducing employees' hours of work and overtime opportunities without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(f) Requiring employees to return home and retrieve their identification badges before permitting them to work without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(g) Eliminating unit positions and assigning unit work to non-unit employees without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(h) Engaging in unlawful surveillance of employees' union activities.

(i) Changing the break schedule of union supporters to inhibit their ability to engage in union related activities at the facilities.

(j) Coercively soliciting employees to resign from union membership, interrogating them about their willingness to strike, and threatening them with reduced hours if they did so.

(k) Reducing employees' hours to discourage them from continuing to support the union.

(l) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order offer all employees who participated in the unfair labor practice strike which commenced on April 1, 1996 full reinstatement to their former jobs without prejudice to their seniority or any rights or privileges previously enjoyed; and make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them in the manner set forth in the remedy section of the decision.

(b) On request, rescind all unilateral actions here found to have been effected in violation of collective bargaining obligations and make any employee adversely affected by those actions, or by unlawful discriminations, whole for any loss of earnings and other benefits suffered as a result thereof in the manner set forth in the Remedy section of the decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at the nursing homes named above copies of the attached notice marked "Appendix."[71] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's

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[71] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found in relation to this Respondent

Issues concerning whether remedies should extend to any or all of the interrelated Beverly companies, including Respondents BHRI and BE-P, because of asserted common responsibility for the unfair labor practices, are hereby severed and reserved for resolution by me in a separate supplemental proceeding.

Dated, Washington, D.C. November 26, 1997

/s/ ROBERT T. WALLACE
ROBERT T. WALLACE
Administrative Law Judge

APPENDIX B

[Excerpts from Court of Appeals Supplemental Appendix]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket Nos. 97-3200 AND 97-3357

GERALD KOBELL, REGIONAL DIRECTOR FOR REGION SIX OF THE NATIONAL LABOR RELATIONS BOARD FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD, APPELLEE/CROSS-APPELLANT

VS.

BEVERLY HEALTH AND REHABILITATION SERVICES, INC., ITS OPERATING REGIONAL OFFICES, WHOLLY OWNED SUBSIDIARIES AND INDIVIDUAL FACILITIES AND EACH OF THEM, AND/OR ITS WHOLLY-OWNED SUBSIDIARY BEVERLY ENTERPRISES-PENNSYLVANIA, INC.; D/B/A BEVERLY MANOR OF MONROEVILLE, D/B/A CLARION CARE CENTER, D/B/A FAYETTE HEALTH CARE CENTER, D/B/A FRANKLIN CARE CENTER, D/B/A GRANDVIEW HEALTH CARE, D/B/A HAIDA MANOR, D/B/A MEADVILLE CARE CENTER, D/B/A MEYERSDALE MANOR, D/B/A MT. LEBANON CONVALESCENT CENTER, D/B/A MURRAY MANOR, D/B/A RICHLAND MANOR, D/B/A WILLIAM PENN NURSING CENTER, D/B/A BEVERLY MANOR OF READING, D/B/A BEVERLY MANOR OF LANCASTER, D/B/A BLUE RIDGE HAVEN CONVALESCENT CENTER WEST, D/B/A CALEDONIA MANOR, D/B/A CAMP HILL CARE CENTER, D/B/A CARPENTER CARE CENTER, D/B/A STROUD MANOR, D/B/A YORK TERRACE NURSING CENTER, APPELLANTS/CROSS-APPELLEES

APPEAL FROM THE MEMORANDUM AND ORDER ISSUED APRIL 14, 1997 BY THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA IN CASE NO. 96-1280

SUPPLEMENTAL APPENDIX

LITTLER, MENDELSON, P.C.
WARREN M. DAVISON
THOMAS P. DOWD

World Trade Center, Suite 1653
Baltimore, Maryland 21202-3005
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STIPULATION

Counsel for Appellants/Cross-Appellees[1] and counsel for Appellee/Cross-Appellant hereby enter into the following Stipulation regarding the documents in Supplemental Appendix pages SA.4-64:

1. On or about June 28, 1997, Appellants in Docket Nos. 97-3200 and 97-3357, entered into collective bargaining agreements with the respective unions who

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[1] Counsel for the parties in this litigation differ as to whether Beverly Health and Rehabilitation Services, Inc. *et al.* should be identified as a single entity (Appellant/Cross-Appellee) or as a collection of separate entities (Appellants/Cross-Appellees). For purposes of this Stipulation, Beverly Health and Rehabilitation Services, Inc. *et al.* will be referred to Appellants/Cross-Appellees, but counsel for the parties agree that this designation is being made in this Stipulation solely for convenience and does not constitute a waiver by either party of its arguments regarding single employer status or the correct designation of Beverly Health and Rehabilitation Services, Inc. *et al.* in connection with this Appeal and Cross-Appeal.

represented units of employees at those facilities involved in this case, except for Grandview Healthcare and the LPN unit at Mt. Lebanon Manor Convalescent Center.

* * * * *

5. The document entitled Attachment #8 identified at Supplemental Appendix page SA.64 is a true and correct copy of an Agreement entered into between the Appellants in this litigation and the respective unions who represent units of employees at the facilities covered by this appeal. This Agreement provides that the Grandview Healthcare facility and the LPN unit at Mt. Lebanon Manor Convalescent Center facilities will have similar contract terms as set forth in the Agreement if the unions prevail in the pending National Labor Relations Board proceedings. In those pending proceedings, Appellant withdrew recognition from the unions representing the service and maintenance employees at Grandview Healthcare and representing the LPN unit at Mt. Lebanon Manor Convalescent Center.

IT IS SO STIPULATED.

/s/ JUDITH KATZ by TPD
Ellen Farrell
Judith Katz
Margaret Luke
NATIONAL LABOR RELATIONS BOARD
1099 14th Street, NW
Washington, D.C. 20570-0001

Counsel for Appellee/Cross-Appellant

/s/ WARREN M. DAVISON
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A Professional Corporation
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(410) 528-9545

Counsel for Appellants/Cross-Appellees

Dated: August 15, 1997

* * * * *

REINSTATEMENT AGREEMENT

Notwithstanding the pending litigation relating to the 1996 strike, or the term of this Agreement, the Employer agrees to complete the reinstatement of all strikers to their former positions prior to the strike, as required by the 10(j) injunction, regardless of the outcome of this litigation. Accordingly, these individuals will be restored to the status of regular employees within their respective bargaining units for all employment purposes. Entitlement to backpay, seniority accrual, or reimbursement for any expenses caused by a loss of benefit coverage during the period between the end of the strike and their reinstatement shall be determined through the pending litigation. If employees returning to work request different positions from their former position prior to the strike, granting such request shall not be considered a violation of this section.

For the Employer	For the Union
Date	Date

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

Civil No. 96-1280

GERALD KOBELL, REGIONAL DIRECTOR FOR REGION SIX OF THE NATIONAL LABOR RELATIONS BOARD FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BEVERLY HEALTH AND REHABILITATION SERVICES, INC., ITS OPERATING REGIONAL OFFICES, WHOLLY OWNED SUBSIDIARIES AND INDIVIDUAL FACILITIES AND EACH OF THEM, AND/OR ITS WHOLLY-OWNED SUBSIDIARY BEVERLY ENTERPRISES-PENNSYLVANIA, INC.; D/B/A BEVERLY MANOR OF MONROEVILLE; D/B/A CLARION CARE CENTER; D/B/A FAYETTE HEALTH CARE CENTER; D/B/A FRANKLIN CARE CENTER; D/B/A GRANDVIEW HEALTH CARE; D/B/A HAIDA MANOR; D/B/A MEADVILLE CARE CENTER; D/B/A/ MEYERSDALE MANOR; D/B/A/ MT. LEBANON CONVALESCENT CENTER; D/B/A MURRAY MANOR; D/B/A RICHLAND MANOR; D/B/A WILLIAM PENN NURSING CENTER; D/B/A BEVERLY MANOR OF READING; D/B/A BEVERLY MANOR OF LANCASTER; D/B/A BLUE RIDGE HAVEN CONVALESCENT CENTER WEST; D/B/A CALEDONIA MANOR; D/B/A CAMP HILL CARE CENTER; D/B/A CARPENTER CARE CENTER; D/B/A STROUD MANOR; D/B/A YORK TERRACE NURSING CENTER; RESPONDENT

Consent Order Extending Injunction

AND NOW, this 3d day of October, 1997, upon consideration of Petitioner's amended motion to extend injunction and Beverly Health and Rehabilitation Services, Inc., et al.'s consent thereto, it is hereby ORDERED that the motion is granted and the injunction is extended for a period of 60 days from October 4, 1997 and will expire on December 4, 1997, subject to the right of Petitioner to move to extend it as set forth in the order granting the injunction.

/s/ D. BROOKS SMITH
D. BROOKS SMITH
United States District
Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

Civil No. 96-1280

GERALD KOBELL, REGIONAL DIRECTOR FOR REGION SIX OF THE NATIONAL LABOR RELATIONS BOARD FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BEVERLY HEALTH AND REHABILITATION SERVICES, INC., ITS OPERATING REGIONAL OFFICES, WHOLLY OWNED SUBSIDIARIES AND INDIVIDUAL FACILITIES AND EACH OF THEM, AND/OR ITS WHOLLY-OWNED SUBSIDIARY BEVERLY ENTERPRISES-PENNSYLVANIA, INC.; D/B/A BEVERLY MANOR OF MONROEVILLE; D/B/A CLARION CARE CENTER; D/B/A FAYETTE HEALTH CARE CENTER; D/B/A FRANKLIN CARE CENTER; D/B/A GRANDVIEW HEALTH CARE; D/B/A HAIDA MANOR; D/B/A MEADVILLE CARE CENTER; D/B/A/ MEYERSDALE MANOR; D/B/A/ MT. LEBANON CONVALESCENT CENTER; D/B/A MURRAY MANOR; D/B/A RICHLAND MANOR; D/B/A WILLIAM PENN NURSING CENTER; D/B/A BEVERLY MANOR OF READING; D/B/A BEVERLY MANOR OF LANCASTER; D/B/A BLUE RIDGE HAVEN CONVALESCENT CENTER WEST; D/B/A CALEDONIA MANOR; D/B/A CAMP HILL CARE CENTER; D/B/A CARPENTER CARE CENTER; D/B/A STROUD MANOR; D/B/A YORK TERRACE NURSING CENTER; RESPONDENT

Consent Order Further Extending Injunction

AND NOW, this 2nd day of December, 1997, upon consideration of Petitioner's motion to further extend injunction, it appearing that there is good cause for the extension, it is hereby ORDERED that the motion is granted and the injunction is further extended for a period of six months from December 4, 1997 and will expire on May 4, 1998, subject to the right of Petitioner to move to extend it as set forth in the order granting the injunction.

/s/ D. BROOKS SMITH
D. BROOKS SMITH
United States District
Judge

Supreme Court, U.S.
FILED
DEC 22 1998
OFFICE OF THE CLERK

(3)

No. 98-492

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BEVERLY HEALTH AND REHABILITATION SERVICES, INC., *et al.*,

Petitioners,

vs.

GERALD KOBELL, Regional Director for Region Six of the National Labor Relations Board for and on behalf of THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICAN HEALTH CARE ASSOCIATION IN SUPPORT OF PETITIONERS

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29

TABLE OF CONTENTS

	Page
Table of Cited Authorities	iv
Consent to Filing	1
Interest of the *Amicus Curiae*	1
I. The Section 10(j) And 8(g) Issues Significantly Impact The AHCA's Membership And The Patients Served By Health Care Institutions.	2
II. By Permitting Unions To Unilaterally Extend Section 8(g)'s Explicit Notice Requirement, The Board Has Again Ignored The Clear Statutory Language Of The Act.	3
A. Congress Enacted Section 8(g) To Allow Health Care Institutions To Provide Uninterrupted Care To Patients.	5
B. The Board Created A 72-Hour Exception To Section 8(g)'s Ten-Day Notice Requirement.	6
C. The Board's Interpretation of Section 8(g) Is Improper Because The Statutory Language is Clear and Unambiguous.	7
1. The Board's Construction of Section 8(g) Is Unsupportable Under the Chevron Standard.	7

Contents

Page

2. The Board's Reliance on Legislative History Is Flawed Because Section 8(g)'s Notice Provision Is Clear. 8

3. Proper Construction of the Legislative History Does Not Support the Board's Interpretation of Section 8(g). 9

4. Courts of Appeals Have Looked To Section 8(g)'s Express Statutory Language In Rejecting Contrary Legislative History. 10

D. No Reviewing Court Has Ever Upheld The Board's 72-Hour Exception to Section 8(g)'s Notice Requirement. 11

E. The Board Has Ignored The Rights Of Individuals That Congress Intended Section 8(g) To Protect. 13

III. The District Court's "Rubber Stamp" Of The Board's Baseless Interpretation Of Section 8(g) Shows Why This Court Must Adopt The Traditional Test For 10(j) Injunctions. 13

A. Section 10(j) Extends Extraordinary Authority to the Board to Pursue Injunctive Relief. 14

Contents

Page

B. This Court Should Adopt the View of Those Courts of Appeals Which Apply the Traditional Four-Part Test To Section 10(j) Injunction Requests. 15

1. This Court Should Require Section 10(j) Injunctions Be Supported By "A Likelihood Of Success On The Merits". 16

2. Courts Should Apply The Last Three Prongs of the Four-Part Test To Determine Whether Injunctive Relief Is Just and Proper. 17

C. The Two-Prong Test For Section 10(j) Injunctions Impermissibly Restrains Federal Courts' Exercise of Their Remedial Authority. 18

D. The Instant Matter Provides Compelling Rationale For Abandoning The Board's Two-Pronged Test. 19

Conclusion 20

TABLE OF CITED AUTHORITIES

Page

Cases:

Angle v. Sacks, 382 F.2d 655 (6th Cir. 1967) 16, 18

Bio-Medical Applications of New Orleans, Inc., 240 N.L.R.B. 432 (1979) 4, 6, 7, 8, 9

Boire v. Pilot Freight Carrirs, Inc., 515 F.2d 1185 (5th Cir. 1975) 16

Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778 (1984) 7, 8

D'Amico v. Townsend Culinary, Inc., No. Civ. A. AW 98-2673, 1998 WL 687228, *3 - *4 (D. Md. September 30, 1998) 16, 17

D'Amico v. U.S. Service Industries, Inc., 867 F. Supp. 1075 (D.D.C. 1994) 15, 16

District 1199-E Hospital and Health Care Employees, 243 N.L.R.B. 23 (1979) 5

East Chicago Rehabilitation Center, Inc. v. NLRB, 710 F.2d 397 (7th Cir. 1983) 10

Gottfried v. Frankel, 818 F.2d 485 (6th Cir. 1987) 16, 17

Kapiolani Hospital v. NLRB, 581 F.2d 230 (9th Cir. 1978) 10

Cited Authorities

	Page
Kaynard v. Mego Corp., 633 F.2d 1026 (2d Cir. 1983)	15
Kinney v. Pioneer Press, 881 F.2d 485 (7th Cir. 1985)	15, 19
Kobell v. Suburban Lines, Inc., 731 F.3d 1076 (3d Cir. 1984)	16, 17
Miller v. California Pacific Medical Center, 19 F.3d 449 (9th Cir. 1994)	15
Montefiore Hospital and Medical Center v. NLRB, 621 F.2d 510 (2d Cir. 1980)	10
NLRB v. Health Care and Retirement Corp., 511 U.S. 571, 114 S. Ct. 1778 (1994)	3, 4, 7, 9
NLRB v. Stationary Engineers Local 39, 746 F.2d 530 (9th Cir. 1984)	5
NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc., 897 F.2d 1238 (2d Cir. 1990)	5, 11, 12, 13
Pascarell v. Vibra Screw Inc., 904 F.2d 874 (3d Cir. 1990)	18
Pierce v. Underwood, 487 U.S. 552, 111 S. Ct. 1539 (1988)	9

Cited Authorities

	Page
Pye v. Sullivan Bros. Printers, Inc., 38 F.2d 58 (1st Cir 1994)	15
United States v. American College of Physicians, 475 U.S. 834, 106 S. Ct. 1591 (1986)	9
Walker Methodist Residence and Health Care Center, 227 N.L.R.B. 1630 (1977)	5
Weinberger v. Romero-Barcelo, 456 U.S. 309, 102 S. Ct. 1798 (1982)	18, 19
Statutes:	
29 U.S.C. § 152(11)	4
29 U.S.C. § 158(g)	*passim*
29 U.S.C. § 160(j)	*passim*
29 U.S.C. § 160(l)	19
Rule:	
Supreme Court Rule 37.3	1
Other Authorities:	
120 *Cong. Rec.* 12945 (1974)	10
120 *Cong. Rec.* 12994 (May 2, 1974).	9, 10

Cited Authorities

	Page
H. Rept. 93-1051, 93d Cong. 2d sess. 3	8
S. Rept. 93-766, 93d Cong. 2d sess. 4	8

CONSENT TO FILING

This *amicus curiae* brief is filed pursuant to Supreme Court Rule 37.3 with the written consent of all parties in interest. Letters of consent are filed with the Clerk of the Court.[1]

INTEREST OF THE *AMICUS CURIAE*

The American Health Care Association ("AHCA") is a federation of 50 state health organizations, together representing nearly 12,000 non-profit and for-profit assisted care providers that care for more than one million elderly and disabled individuals nationally. The AHCA represents and advocates for the nation's long-term care community and for individuals who, because of social needs, disability, trauma or illness, require services provided in a long-term care setting.

This case requires this Court to apply Section 8(g) of the National Labor Relations Act ("NLRA" or "the Act"), 29 U.S.C. § 158(g), which explicitly requires labor organizations to provide health care institutions with ten-days written notice before engaging in a strike or picketing. The statute's sole exception permits strike notice to be extended with the written consent of the parties. This notice requirement is immensely important to the AHCA, whose member institutions are entrusted with maintaining uninterrupted care to the elderly and disabled.

Notwithstanding clear statutory language and its salutary purposes, the National Labor Relations Board ("NLRB" or "the Board") has created a 72-hour exception. There is *no basis* in the unambiguous statutory language for this exception which, in effect, eviscerates the benefit of the notice to health care institutions. In the underlying Section 10(j) injunction proceeding, the district

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1. Counsel for a party did not author this brief in whole or in part and no person or entity, other than the *amicus curiae*, its members, or counsel, have made a monetary contribution to the preparation or submission of the brief.

court erred by adopting an unduly deferential standard of review of the Board's interpretation of Section 8(g). Regardless of which injunction test applies, the district court was incorrect in upholding the Board's extra-statutory interpretation of Section 8(g). It is of critical importance to the AHCA and its members that this error be corrected by this Court.

I.

THE SECTION 10(j) AND 8(g) ISSUES SIGNIFICANTLY IMPACT THE AHCA'S MEMBERSHIP AND THE PATIENTS SERVED BY HEALTH CARE INSTITUTIONS.

The health care industry is extremely concerned about how the Board's continued misinterpretation of Sections 10(j) and 8(g) of the National Labor Relations Act undermines its right and duty to provide uninterrupted care. Here, the district court, applying an unduly deferential standard of review, granted the Board's request for injunctive relief under Section 10(j) requiring certain health care facilities operated by Petitioners to reinstate employees who engaged in an unlawful strike under Section 8(g). The district court acknowledged it found the Board's extra-statutory interpretation of Section 8(g)'s notice requirement faulty. (Petition, Apdx. D-54). The district court, nevertheless, felt constrained by the precedent of the U.S. Court of Appeals for the Third Circuit to adopt the Board's view and grant the injunction request.

This issue is of critical — perhaps life or death — importance to the AHCA's member nursing homes. Preparing a health care institution to operate in the face of a strike is an enormous and time-sensitive effort which may be effectively nullified by even a short delay. Indeed, the impact of a 72-hour exemption to Section 8(g)'s ten-day notice requirement cannot be discussed in the abstract. When confronted with a ten-day strike notice, a health care facility must find qualified people to care for its elderly and infirm patients. Since nursing personnel must be trained prior to

working with patients, this is no perfunctory task. It might prove necessary for a facility to search surrounding and even distant communities to obtain suitable staff prepared to work on a date specified in the ten-day strike notice. If a union is free to unilaterally extend a strike notice, there is a strong likelihood that conditional workers would return to other employment. In sum, a unilateral extension of a strike notice could effectively preclude a nursing home from finding replacements when a strike actually takes place. The resulting danger to patient care is exactly what Congress sought to avoid in enacting Section 8(g).

The health care industry joins Petitioners in urging this Court to review two issues: 1) the split among the judicial circuits concerning the proper standard for analyzing Board requests for Section 10(j) injunctions and 2) the Board's *sua sponte* creation of a 72-hour exception to Section 8(g)'s explicit 10-day notice requirement. As asserted in the Petition, this Court has not, in the statute's fifty (50) year history, reviewed any appellate interpretation of Section 10(j). Additionally, if not rejected here, the Board's extra-statutory modification of Section 10(j) is likely to cause these issues to again go before this Court in the same procedural posture. Therefore, the AHCA respectfully requests this Court grant the Petition and review these issues of immense significance to the health care industry.

II.

BY PERMITTING UNIONS TO UNILATERALLY EXTEND SECTION 8(g)'S EXPLICIT NOTICE REQUIREMENT, THE BOARD HAS AGAIN IGNORED THE CLEAR STATUTORY LANGUAGE OF THE ACT.

The NLRB has a history and established track record of administratively "amending" the NLRA when it suits the Board's policy objectives. For example, in *NLRB v. Health Care and Retirement Corp.*, 511 U.S. 571, 114 S. Ct. 1778 (1994) ("*HCR*"), this Court rejected the Board's effort to administratively modify

the standard for determining supervisory status contained in Section 2(11) of the NLRA. Specifically, the Board contended that nurses's fulfillment of supervisory indicia related to patient care was not in the "interest of the employer" as enumerated by Section 2(11). This Court rejected the Board's effort to create a "statutory dichotomy" particularly addressed to health care institutions, finding patient care *was* the interest of a health care employer. 114 S. Ct. at 1783. This Court also rejected the Board's reliance on legislative history to the NLRA and its 1974 amendments to support its modification of the Act's express statutory language.

The Board's effort to unilaterally amend the Act as applied to health care institutions in the instant case mirrors those this Court rejected in *HCR*. Section 8(g), provides, in relevant part:

> A labor organization before engaging an any strike, picketing, or any other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing. . . . The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

29 U.S.C. § 158(g). In addition to detailing the time and form of the notice unions must give health care employers prior to taking the enumerated actions, Section 8(g) provides the sole means for extending the notice — *the written agreement of both parties*. Despite the unequivocal statutory language, the Board has interpreted Section 8(g) to allow unions to extend a strike notice by 72 hours. *Bio-Medical Applications of New Orleans, Inc.*, 240 N.L.R.B. 432 (1979). The Board's refusal to consistently apply the Act to health care institutions, as countenanced by the U.S. Court of Appeals for the Third Circuit, requires this Court's review.

A. Congress Enacted Section 8(g) To Allow Health Care Institutions To Provide Uninterrupted Care To Patients.

The Board and reviewing courts have recognized Section 8(g) was enacted to protect patients from disruptions in care. "At a health care institution, disruption in patient care of even a few hours may cost lives." *NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc.*, 897 F.2d 1238, 1247 (2d Cir. 1990). As the Ninth Circuit observed,

> *Strict adherence to notice requirements is essential in the area of health care institutions*, in light of Congress' concern "that sudden, massive strikes could endanger the lives and health of patients in health care institutions."

NLRB v. Stationary Engineers Local 39, 746 F.2d 530, 533 (9th Cir. 1984) (quoting *Walker Methodist Residence and Health Care Center*, 227 N.L.R.B. 1630, 1631 (1977)) (emphasis added). The court also found:

> Section 8(g) and its legislative history make it clear that Congress was particularly concerned with the necessity that health care institutions be apprized sufficiently in advance of any planned picketing or other work stoppages in order to allow the health care institution to take steps to protect the continuity of the health care services it renders to its patients.

Stationary Engineers, 746 F.2d at 533 (citing *District 1199-E Hospital and Health Care Employees*, 243 N.L.R.B. 23, 24 (1979)). Recognizing health care institutions need accurate notice of any work stoppage, Congress specifically provided in Section 8(g): "The notice shall state the date and time that such action will commence." 29 U.S.C. § 158(g).

Congress's respect for the responsibility of health care institutions to give continuous care to patients is also reflected in the sole method for extending notice recognized in Section 8(g):

"The notice, once given, may be extended by the *written agreement of both parties*." 29 U.S.C. § 158(g) (emphasis added). Requiring the health care institution's written agreement prior to extended a strike date assures the institution of the opportunity to assess whether it will have sufficient time to adjust its strike preparation plan. Alternatively, the health care institution may require the union to give it another ten-days' notice. A union's unilateral extension of a strike notice as advocated by the Board does not assure patients will receive uninterrupted care.

B. The Board Created A 72-Hour Exception To Section 8(g)'s Ten-Day Notice Requirement.

Despite Section 8(g)'s explicit, unambiguous notice requirement, the Board "amended" Section 8(g) to permit a union to unilaterally extend its strike notice by up to 72 hours in *Bio-Medical Applications of New Orleans, Inc.*, 240 N.L.R.B. 432 (1979). The Board's self-created exception to Section 8(g)'s notice requirement is unsupported by the text of the statute or its legislative history.

In *Bio-Medical*, the union unilaterally extended its strike notice by 24 hours. Strictly applying Section 8(g), the administrative law judge determined the strike was unlawful because the union's extension was unilateral and lacked the requisite written consent of both parties. *Bio-Medical*, 240 N.L.R.B. at 438. Deeming it undisputed that "the union did not comply with the literal terms of Section 8(g)," the Board nonetheless found:

> It is thus clear that Congress, as revealed through its committee reports and the remarks of two of the leading proponents of the health care amendments, not only contemplated, but specifically approved, a labor organization's extension of the time set forth in the initial 10-day notice for the commencement of a strike *by unilateral notification to the employer*. . . .

Id. at 435 (emphasis added). The Board also found the use of "may" in Section 8(g)'s last sentence meant that the written agreement of the parties was not the "exclusive manner of extending an initial strike date." *Id.* at 434. Because the union gave the health care employer at least 12 hours notice of the new strike date, the Board found the union in compliance with Section 8(g). *Id.* at 435.

C. The Board's Interpretation of Section 8(g) Is Improper Because The Statutory Language is Clear and Unambiguous.

> The Act is to be enforced according to its own terms, not by creating legal categories inconsistent with its meaning, as the Board has done in nurse cases. Whether the Board proceeds through adjudication or rulemaking, the statute must control the Board's decision, not the other way around.

NLRB v. Health Care & Retirement Corp., 511 U.S. 576, 114 S. Ct. 1778, 1783-84 (1994). Because Congress chose for Section 8(g) extremely clear language concerning when strike notice must be provided to health care institutions, the Board's application of the statute in *Bio-Medical* cannot be sustained.

1. *The Board's Construction of Section 8(g) Is Unsupportable Under the Chevron Standard.*

"The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 fn. 9, 104 S. Ct. 2778, 2781 fn. 9 (1984) (citations omitted). In *Chevron*, this Court set the standard for a federal court's review of an agency's construction of the statute it administers:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter;

> for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

467 U.S. at 842-43, 104 S. Ct. at 278. If Congress has not addressed the precise question at issue, then the court must determine if the agency's construction is permissible. 467 U.S. at 843, 104 S. Ct. at 2781-82.

In the present case, Section 8(g) clearly delineates the condition under which a union's ten-day notice may be extended — the written agreement of both parties. Because Congress unambiguously spoke of the circumstance under which strike notice may be extended, the Board's *sua sponte* creation of an exception to Section 8(g) permitting a union to unilaterally extend notice cannot stand.

2. *The Board's Reliance on Legislative History Is Flawed Because Section 8(g)'s Notice Provision Is Clear.*

The clear, unambiguous nature of Section 8(g)'s ten-day written notice requirement precludes any need to resort to legislative history. As discussed above, Section 8(g) in no uncertain terms requires unions to provide health care institutions with ten-days written notice prior to commencing a strike or picketing. 29 U.S.C. § 158(g). In *Bio-Medical*, however, the Board eschewed Section 8(g)'s clear language in favor of Senate and House committee reports and the remarks of a few Congressmen. 240 N.L.R.B. at 434-35; S. Rept. 93-766, 93d Cong. 2d sess. 4; H. Rept. 93-1051, 93d Cong. 2d sess. 3. The reports cited by the Board opined "it would be unreasonable, in the Committee's judgment, if a strike or picketing commenced more than 72 hours after the time specified in the notice." *Id.*

Using this committee report as a basis for the Board to "amend" Section 8(g) is reminiscent of the Board's tortious construction in *HCR*. There, the Board attempted to circumvent the clear meaning of the Act through reference to the legislative history cited by the Board in *Bio-Medical*. This Court rejected the

Board's effort to subordinate the statutory language to isolated references to committee reports. "It is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means." *HCR*, 511 U.S. 580, 582, 114 S. Ct. 1778, 1784 (1994) (quoting, *Pierce v. Underwood*, 487 U.S. 552, 566, 111 S. Ct. 1539 (1988)). This Court should also reject the Board's efforts to reach beyond the statute because Section 8(g)'s notice provision is clear and unambiguous.

3. *Proper Construction of the Legislative History Does Not Support the Board's Interpretation of Section 8(g).*

This Court has declined to rely on legislative history discussing language or issues not incorporated within the statute. *See United States v. American College of Physicians*, 475 U.S. 834, 845-46, 106 S. Ct. 1591, 1598 (1986) (committee reports were improper basis to determine Congressional intent concerning issue not addressed by statutory language). As discussed above, the Board in *Bio-Medical* based its interpretation of Section 8(g)'s explicit notice requirement on inconclusive statements in committee reports and isolated comments by Congressmen. It is axiomatic Congress would have included the 72-hour exception to Section 8(g)'s ten-day notice requirement *if a majority of members desired to include such language.*

In fact, comments by a Senator *not* cited in *Bio-Medical* demonstrate congressional representatives advancing a broader interpretation of Section 8(g) could not gain sufficient support among their colleagues to include such language in the statute. Senator Fannin specifically noted during debate on Section 8(g) that the Senate Committee Report was "in many respects a curious document [because] there is an obvious intent to substitute intent of the Senate for the words of the law." 120 *Cong. Rec.* 12994 (May 2, 1974). Senator Fannin noted several instances, including whether unions could unilaterally extend strike notices, in which the committee report expressed "the sense on the committee". *Id.* Senator Fannin asked continually, "Why not put it in the law itself?

If the words of the law are clear, courts do not look to Congressional intent." *Id.* (Emphasis added). As Senator Fannin's inquiry illustrates, the committee was aware its comments would not bear the weight of the statutory language.

Rather than apply the text of Section 8(g), the Board has elevated pieces of legislative history beyond the enacted law. As such, the Board has contravened this Court's explicit instructions.

4. *Courts of Appeals Have Looked To Section 8(g)'s Express Statutory Language In Rejecting Contrary Legislative History.*

Where the statute's language is clear, reviewing courts have applied Section 8(g) by its terms. For instance, courts have been asked to address whether Section 8(g) is applicable to individuals. The statute provides that "a labor organization" must give ten-days written notice of strike or picketing to a health care institution. 29 U.S.C. § 158(g). During Congressional debates of the 1974 Health Care Amendments, however, Senator Taft, one of the authors of the amendment, stated: "It would not be protected activity for employees acting without a labor organization to engage in a work stoppage or picket without giving the required notice." 120 *Cong. Rec.* 12945 (1974).

In addressing this conflict between Section 8(g)'s statutory language limiting the notice obligation to labor organizations and the contrary legislative history, courts have relied on the statute. *See East Chicago Rehabilitation Center, Inc. v. NLRB*, 710 F.2d 397, 403 (7th Cir. 1983) ("[e]very other decision has read Section 8(g) to mean what it says: the notice requirement is applicable only if the strike is by a labor organization."); *Montefiore Hospital and Medical Center v. NLRB*, 621 F.2d 510, 515 (2d Cir. 1980) ("[w]e cannot conclude that the legislative history requires us to ignore the unambiguous language of Section 8(g)."); *Kapiolani Hospital v. NLRB*, 581 F.2d 230, 234 (9th Cir. 1978) ("the notice requirement of Section 8(g) should be read in accordance with its clear language.").

Similar to limiting the notice requirement to labor organizations, the clear language of Section 8(g) unequivocally provides the statute's ten-day notice requirement may be extended with the written agreement of the parties, regardless of any arguably contrary sentiments in the legislative history. The AHCA submits this Court should similarly require the Board to respect the clear, unambiguous language of Section 8(g).

D. No Reviewing Court Has Ever Upheld The Board's 72-Hour Exception to Section 8(g)'s Notice Requirement.

Significantly, *no reviewing court* has ever been fooled by the Board's emphasis on extraneous comments in the legislative history of Section 8(g) to the detriment of the statutory language. In fact, the Second Circuit has expressly rejected the Board's contention that Section 8(g)'s explicit notice requirement is somehow nullified by its legislative history. *NLRB v. Washington Heights-Mental Council, Inc.*, 897 F.2d 1238 (2d Cir. 1990).

In *Washington Heights*, the Board found a union's strike to be lawful under Section 8(g) even though the union unilaterally delayed the strike for one day without notice to the health care institution. The Board concluded that the union's failure to give 12 hours notice was not important since the health care institution was prepared for the strike. The Board also concluded that the union's strike was an unfair labor practice strike and, as such, was exempt from Section 8(g). In holding that unfair labor practice strikes were exempt from Section 8(g), the Board relied upon the same legislative history that it cited in crafting the 72-hour exception.

The Second Circuit rejected the Board's position stating:

> Given that the Center might well have figured out that the strike was to begin on the morning of September 29, we might appear unduly parsimonious about compliance with the notice requirement. *We are not . . . at liberty to depart from the straightforward unambiguous language of the statute requiring the*

> *Union to specify in writing the date and time it would strike.* Furthermore, we are convinced that the notice requirement is appropriately read strictly. At a health care institution, disruption in patient care of even a few hours may cost lives. "Strict adherence to notice requirements is essential in the area of health care institutions, in light of Congress' concern 'that sudden, massive strikes could endanger the lives and health of patients. . . .' " *NLRB v. Stationary Eng'rs, Local 39*, 746 F.2d 530, 533 (9th Cir. 1984) (citation omitted).

Washington Heights, 897 F.2d at 1247 (emphasis added).[2]

The Second Circuit casts doubt on the Board's reliance on Section 8(g)'s legislative history when the statutory language is unmistakable:

> We have doubts about the force of this legislative history. This language carves an explicit exception to the notice requirement. . . .Where the full Congress has not done so, we cannot create an exception to the Act. To borrow the words of Justice Cardozo: "We take the statute as we find it." *Anderson v. Wilson*, 289 U.S. 20, 27, 53 S. Ct. 417, 420 (1933).

897 F.2d at 1247. The AHCA submits Petitioners' position that *Washington Heights* clearly expresses the Second Circuit's *repudiation* of the Board's interpretation of Section 8(g) is correct.

The gravamen of the case at bar is the Board's refusal to apply the explicit provisions of Section 8(g). Instead, the Board obviously intends to apply the version of Section 8(g) which was suggested by the Senate committee, but *rejected by Congress as a whole*. It does so under the guise of "interpreting" the statute. This is a

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2. The Second Circuit found it unnecessary to rule directly on the Board's construction of Section 8(g) since, even under the Board's construction, a union must provide at least 12 hours of supplementary notice, and the union in that case had failed to do so.

transparent attempt to ignore the will of Congress, and its stated policy of protecting the rights of patients to continuous and uninterrupted health care.

E. The Board Has Ignored The Rights Of Individuals That Congress Intended Section 8(g) To Protect.

By focusing exclusively on collective bargaining rights in its analysis of Section 8(g), the Board has completely ignored the interests of patients in health care institutions. These interests were well-described by the Second Circuit in *Washington Heights*:

> . . . Section 8(g) notice is not designed to protect the interest of either employers or employees. *Section 8(g) notice protects the interest of third parties for whom an unanticipated work stoppage may be a life-or-death matter*. We are reluctant to conclude that the full Congress intended to sacrifice the safety of the sick or dying to help labor organizations at health care institutions avoid a ten-day delay in going on strike.

897 F.2d at 1248 (emphasis added).

The Board clearly has lost sight of its responsibility to balance collective bargaining rights with the interests of patients in health care institutions. Therefore, the AHCA, on behalf of the health care industry, urges this Court to join the Second Circuit in rejecting the Board's overreaching, tortured "amendment" of Section 8(g).

III.

THE DISTRICT COURT'S "RUBBER STAMP" OF THE BOARD'S BASELESS INTERPRETATION OF SECTION 8(g) SHOWS WHY THIS COURT MUST ADOPT THE TRADITIONAL TEST FOR 10(j) INJUNCTIONS.

As discussed in Point I, *supra*, the Board's *sua sponte* creation of an exception to Section 8(g)'s notice requirement has no basis

in the statute. In fact, the district court initially reviewing the Board's injunction request acknowledged that Section 8(g) "makes no mention" of a 72-hour unilateral extension. *See* Petition at Appendix C-21. The district court, however, felt constrained by Third Circuit precedent from addressing the Board's legal theory when evaluating the Section 10(j) injunction request. *Id.* at Appendix C-22. The AHCA submits that the bizarre result in the instant matter exemplifies why this Court must resolve the schism among the Courts of Appeals and require federal courts to review Section 10(j) injunction requests as they would other injunction petitions.

A. Section 10(j) Extends Extraordinary Authority to the Board to Pursue Injunctive Relief.

Section 10(j) provides that the Board may seek an injunction in federal district court "upon issuance of a complaint" alleging an unfair labor practice. 29 U.S.C. § 160(j). In other words, the Board may request an injunction prior to conducting a hearing on the merits of the alleged unfair labor practice. Section 10(j) gives district courts jurisdiction to grant the Board an injunction where the court deems it "just and proper", a standard not defined by Section 10(j). 29 U.S.C. § 160(j).

The extraordinary authority Section 10(j) grants the Board is exemplified by the present case. To ensure continuous medical care and living assistance to patients and residents, Petitioners took steps to hire a replacement staff. Rather than terminate employees engaged in the unlawful strike, Petitioners placed the strikers on a preferential reinstatement list. The district court, *without substantively addressing the legality of the strike*, ordered Petitioners to reinstate all strikers and displace, if necessary, all replacement workers. Employees who engage in a strike that violates Section 8(g) lose their protected status under the Act; such employees are not entitled to reinstatement, and are even subject to discharge. In effect, the district court, absent a substantive hearing or even a cursory review of its legal position, deprived

Petitioners of rights clearly afforded it by the Act while forcing them to take adverse action against the replacement workers.

B. This Court Should Adopt the View of Those Courts of Appeals Which Apply the Traditional Four-Part Test To Section 10(j) Injunction Requests.

The extraordinary remedial measures afforded the Board by Section 10(j) require this Court to apply the traditional four-part test used by federal courts to evaluate Section 10(j) injunction requests. This standard is currently applied to test the propriety of 10(j) injunctions by the Courts of Appeals for the First,[3] Second,[4] Seventh,[5] and Ninth Circuits,[6] and the District Court for the District of Columbia.[7] The traditional standard requires the party moving for an injunction to demonstrate:

1. a likelihood of success on the merits;
2. a probability of irreparable harm if relief is not granted;
3. that such injury outweighs any harm preliminary relief would inflict on the defendant; and
4. that the preliminary relief is in the public interest.

Pye v. Sullivan Bros. Printers, Inc., 38 F.2d 58, 63 (1st Cir 1994).

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3. *Pye v. Sullivan Bros. Printers, Inc.*, 38 F.2d 58, 63 (1st Cir 1994).

4. *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1033 (2d Cir. 1983) (traditional equitable principles considered in evaluating 10(j) injunction requests).

5. *Kinney v. Pioneer Press*, 881 F.2d 485, 490 (7th Cir. 1985).

6. *Miller v. California Pacific Medical Center*, 19 F.3d 449, 457 (9th Cir. 1994).

7. *D'Amico v. U.S. Service Industries, Inc.*, 867 F. Supp. 1075, 1085 (D.D.C. 1994).

The Courts of Appeals for the Third,[8] Fifth,[9] Sixth,[10] and Tenth[11] Circuits, however, employ a test requiring the Board meet a minimal two-part test to obtain a 10(j) injunction. First, the Board must establish "reasonable cause" to believe the unfair labor practice occurred. *Gottfried v. Frankel*, 818 F.2d 485, 493 (6th Cir. 1987). Although not contained in Section 10(j), this prong was included by courts applying the two-part test as an additional, less onerous requirement than the traditional "likelihood of success on the merits" standard. *D'Amico v. United States Serv. Indus., Inc.*, 867 F. Supp. at 1081-82; *D'Amico v. Townsend Culinary, Inc.*, No. Civ. A. AW 98-2673, 1998 WL 687228, *3 - *4 (D. Md. September 30, 1998). The second part of the two-pronged test requires the Board establish the injunction request is "just and proper".

1. *This Court Should Require Section 10(j) Injunctions Be Supported By "A Likelihood Of Success On The Merits".*

Because "Section 10(j) is itself an extraordinary remedy", *Pilot Freight Carriers*, 515 F.2d at 1192, this Court should require the Board to establish it has sufficient legal and factual basis before it invokes Section 10(j)'s sweeping power. Simply put, the "reasonable cause" prong of the two-part test does not demand a sufficient evidentiary showing prior to granting the Board broad equitable authority.[12] By contrast, the "likelihood of success on

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8. *Kobell v. Suburban Lines, Inc.*, 731 F.3d 1076, 1084-89 (3d Cir. 1984).

9. *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1189-93 (5th Cir. 1975).

10. *Gottfried v. Frankel*, 818 F.2d 485, 493-95 (6th Cir. 1987).

11. *Angle v. Sacks*, 382 F.2d 655, 658-60 (6th Cir. 1967).

12. The Third Circuit has found that the "reasonable cause" prong is met so long as the Board's legal theory is "substantial and not frivolous". *Suburban Lines*, 731 F.2d at 1084. Additionally, the Board's (Cont'd)

the merits" prong of the traditional test for injunctive relief is concrete. It is a substantial criterion for the Board to fulfill before it may qualify for the extraordinary relief offered by Section 10(j).

2. *Courts Should Apply The Last Three Prongs of the Four-Part Test To Determine Whether Injunctive Relief Is Just and Proper.*

The final three prongs of the traditional test for injunctions in federal court more completely evaluate the impact on the community of alleged unfair labor practices. After discerning the likelihood of success on the merits, the traditional test requires courts to 1) decide whether irreparable harm is likely, 2) evaluate potential harm to other interested parties, and 3) ensure the proposed injunction is in the public interest. Such a detailed review should precede granting of the dynamic, broad-based relief offered by a Section 10(j) injunction.

In contrast to these wide range of factors, the "just and proper" analysis has been constrained to issues related to collective bargaining. As the Third Circuit posits, "it is just and proper to issue a Section 10(j) injunction when the nature of the alleged

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(Cont'd)
factual findings are judged by a deferential "clearly erroneous" standard. *Gottfried*, 818 F.2d at 493. As the Sixth Circuit describes it:

> [the Board] has a relatively insubstantial burden in that [it] need not prove that an unfair labor practice has occurred, but must only produce *some* evidence in support of the petition. Further, [the Board] need not convince the court of the validity of the Board's theory of liability, as long as the theory is substantial and not frivolous.

Id., *citing*, *inter alia*, *Suburban Lines*, 731 F.2d at 1084 (Emphasis added). *See also Townsend Culinary, Inc.*, 1998 WL 687228 at * 2 ("reasonable cause" standard fulfilled "if there is any evidence which together with all the reasonable inferences that might be drawn therefrom supports a conclusion that there is reasonable cause to believe a violation has occurred").

unfair labor practices are likely to jeopardize the integrity of the bargaining process. . . ." *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 878 (3d Cir. 1990). *See also Angle v. Sacks*, 382 F.2d 655, 660 (10th Cir. 1967) ("The circumstances of the case must demonstrate that there exists a probability that the purposes of the Act will be frustrated . . ." for Section 10(j) relief to be "just and proper").

The health care industry strongly urges this Court to require federal courts to weigh the traditional full spectrum of interests — not just collective bargaining concerns — to ensure Section 10(j) injunctive relief is truly equitable.

C. The Two-Prong Test For Section 10(j) Injunctions Impermissibly Restrains Federal Courts' Exercise of Their Remedial Authority.

This Court's precedent also counsels that federal courts not be constrained in exercising their equitable injunction authority. In *Weinberger v. Romero-Barcelo*, 456 U.S. 309, 102. S. Ct. 1798 (1982), this Court evaluated whether a statute *required* a federal court to enjoin activities if conditions described in the statute were not met. This Court stressed that an injunction is an extraordinary remedy requiring balancing of relative benefits and injuries to the parties and the public, and how these would be affected by granting or withholding an injunction. 456 U.S. at 312, 102 S. Ct. at 1803. As a result, injunctive relief has never been approached as a matter of right, but rather as the province of the court after a careful evaluation of all relevant interests. *Id.*

> The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of law.

456 U.S. at 313, 102 S. Ct. at 1803.

By impermissibly limiting the district court's scope of review, the two-pronged test propounded by the Board offends both the letter and spirit of *Romero-Barcelo*. In that regard, the Seventh Circuit's analysis is compelling:

> Section 10(j) tells the district court to do what's "just and proper," which we read as a statement that traditional rules govern — the approach emphasizing the public interest applied — when the government is the plaintiff. The Director's likelihood of success on the merits *does* matter when it comes to determine whether an injunction is "just and proper". . . .

Kinney v. Pioneer Press, 881 F.2d at 491 (emphasis in original). Accordingly, the Seventh Circuit relied on *Romero-Barcelo* in holding the four-part test appropriate for 10(j) proceedings. *Id.*

The "reasonable cause" prong of the two-part test has no basis in Section 10(j). Rather, this language appears in Section 10(l), 29 U.S.C. § 160(l), a statute which specifically *requires* the Board to pursue injunctive relief if it finds reasonable cause to believe that one of the enumerated violations occurred. Section 10(j), however, does not expressly "restrict the court's jurisdiction in equity." *Romero-Barcelo*, 456 U.S. at 313, 102 S. Ct. at 1803-04. Because Section 10(j) provides no basis for limiting judicial discretion beyond the traditional test, application of the Board's test violates *Romero-Barcelo*.

D. The Instant Matter Provides Compelling Rationale For Abandoning The Board's Two-Pronged Test.

During oral arguments in the present case, the district court expressed serious concern regarding the merits of the Board's application of Section 8(g):

> I want to say this, I wouldn't resolve the statutory interpretation issue the way the Board did. I don't read the statute that way.

(Petition, Apdx D-56). This sentiment is reflected as well in the district court's opinion granting preliminary relief. "Although the bare language of the statute makes no mention [of the 72-hour unilateral extension]. . . ." (Petition, Apdx C-19). The district court nonetheless felt constrained by the Third Circuit's application of the Board's two-pronged test (Petition, Apdx C-40, 41). Additionally, the district court interpreted the "reasonable cause" prong as eliminating its ability to analyze Section 8(g) at all before granting the Board's injunction request. It appears clear that had the district court applied the traditional equitable test, its analysis of the Board's interpretation of Section 8(g) would have resulted in denial of the injunction request. Since, as discussed in Point I, *supra*, the Board's interpretation of Section 8(g) has no basis in the statute, denial of the injunction would have indeed been the result required by Section 8(g).[13] The AHCA joins Petitioners in urging this Court to apply its precedent and to not require district courts to merely "rubber stamp" the Board's patently untenable interpretations of the Act.

CONCLUSION

For the foregoing reasons, the AHCA urges this Court to issue the writ requested. Additionally, this Court should require the Board to abandon its baseless interpretation of Section 8(g) which eviscerates the ten-day notice requirement expressly provided in the statute. Finally, this Court should resolve the conflict among the Courts of Appeals and require district courts to apply the traditional four-part test in evaluating Section 10(j) injunction requests.

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13. Since the Board's extra-statutory interpretation of Section 8(g) does not even survive review under a "substantial and not frivolous" standard, the injunction should have been denied under the two-pronged test for Section 10(j) injunctive relief.

Respectfully submitted,

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No. 98-492

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IN THE

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OCTOBER TERM, 1998

BEVERLY HEALTH AND REHABILITATION SERVICES, INC., *et al.*,
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GERALD KOBELL, Regional Director for Region Six of the National Labor Relations Board for and on behalf of the NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF *AMICI CURIAE* OF LPA AND THE AMERICAN TRUCKING ASSOCIATION, INC. IN SUPPORT OF PETITIONER

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31 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT OF THE CASE	3
SUMMARY OF REASONS FOR GRANTING THE WRIT	3
REASONS FOR GRANTING THE WRIT	4
I. THE THIRD CIRCUIT'S TEST FOR ISSUING 10(j) INJUNCTIONS IS FUNDAMENTALLY CONTRARY TOO WELL-ESTABLISHED EQUITABLE PRINCIPLES AND SUPREME COURT PRECEDENT AND SHOULD BE REVIEWED BY THE COURT	4
A. The Appropriateness of Preliminary Injunctive Relief—Such as That Authorized by Section 10(j) of the NLRA—Is Controlled by a Comprehensive Balancing of Well-Established Equitable Principles	4
B. This Court Has Authoritatively Decided That Traditional Equitable Principles Apply to Injunctive Relief Under a Federal Statute Unless the Statute Itself Limits the Applicability of Such Factors	6
C. Section 10(j) of the NLRA Does Not Limit the Application of Traditional, Well-Established Equitable Principles, but Rather Endorses Their Use	7
D. The Third Circuit Has Completely Abandoned the Traditional, Well-Established Principles Governing the Appropriateness of Injunctions in Cases Arising Under Section 10(j)	9

TABLE OF CONTENTS—Continued

Page

II. THE PROPER STANDARD FOR ISSUING 10(j) RELIEF IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE RESOLVED BY THIS COURT 10

A. 10(j) Relief Is Preliminary in Nature and Necessarily Issued Prior to a Full Adjudication of the Case 11

B. The Unfair Labor Practice Complaint Is Just the First Step in an Adjudicative Process That Involves Many Stages and Levels.... 12

C. 10(j) Injunctions Often Involve Large-Scale, High-Cost Consequences 14

D. 10(j) Injunctions Often Implicate the Interests of Third Parties Not Associated With the Proceedings 15

E. NLRB Decisions Have Been Particularly Unsuccessful in Federal Courts 16

F. The NLRB Has Dramatically Increased Its Use of 10(j) Injunctions in Recent Years.... 19

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

	Page
Angle v. Sacks, 382 F.2d 655 (10th Cir. 1967)	9
In Re Arthur Treacher's Franchisee Litigation, 689 F.2d 1137 (3d Cir. 1982)	11
Asseo v. Pan America Grain Co., 805 F.2d 23 (1st Cir. 1986)	12
Bio-Tech. General Corp. v. Genentech, Inc., 80 F.3d 1553 (Fed. Cir.), *cert. denied*, 519 U.S. 911 (1996)	5
Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185 (5th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976)	9
Bro-Tech Corp. v. NLRB, 105 F.3d 890 (3d Cir. 1997)	19
Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. Co., 363 U.S. 528 (1960)	6-7, 16
Calatrello v. Automatic Sprinkler Corp. of America, 55 F.3d 208 (6th Cir. 1995)	15
Charlotte Amphitheater Corp. v. NLRB, 82 F.3d 1074 (D.C. Cir. 1996)	18
Chemical Waste Management v. Hunt, 504 U.S. 334 (1992)	2
CityFed Finance Corp. v. Office of Thrift Supervision, 58 F.3d 738 (D.C. Cir. 1975)	5
Clark v. Fieldcrest Cannon, Inc., 1994 U.S. Dist. LEXIS 20979 (M.D.N.C. Aug. 25, 1994)	13
D'Amico v. Townsend Culinary, Inc., 159 L.R.R.M. (BNA) 2455 (D. Md. 1998)	7, 8
D'Amico v. U.S. Service Industries, Inc., 867 F. Supp. 1075 (D.D.C. 1994)	7, 8
Dayton Area Visually Impaired Persons v. Fisher, 70 F.3d 1474 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 1421 (1996)	5
Diva Ltd., 325 N.L.R.B. No. 152 (May 22, 1998)	13
Dowd v. International Longshorman's Association, 975 F.2d 779 (11th Cir. 1992)	9
EEOC v. Astra USA, 94 F.3d 738 (1st Cir. 1996)	4
Electromation v. NLRB, 35 F.3d 1148 (7th Cir. 1994)	2

TABLE OF AUTHORITIES—Continued

	Page
Eli Lilly & Co. v. Premo Pharmaceutical Laboratories, Inc., 630 F.2d 120 (3d Cir.), *cert. denied*, 449 U.S. 1014 (1980)	5, 9
Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998)	8
Fieldcrest Cannon v. NLRB, 97 F.3d 65 (4th Cir. 1996)	13
Fresh Mark, Inc., d/b/a Carriage Hill Foods, JD-82-98 (June 8, 1998)	12
Gold Coast Publications v. Corrigan, 42 F.3d 1336 (11th Cir. 1994), *cert. denied*, 516 U.S. 337 (1995)	5
Gottried v. Frankel, 818 F.2d 485 (6th Cir. 1987)	9
Harpercollins San Francisco v. NLRB, 79 F.3d 1324 (2d Cir. 1996)	17
Hecht Co. v. Bowles, 321 U.S. 321 (1944)	6
Hill v. Xyquad, Inc., 939 F.2d 627 (8th Cir. 1991)	5
International Brotherhood of Teamsters v. Local Union No. 810, 19 F.3d 786 (2d Cir. 1994)	4-5
Johnson v. California State Board of Accountancy, 72 F.3d 1427 (9th Cir. 1995)	5
Jordan Marsh Stores Corp., 317 N.L.R.B. 460 (1995)	14
Kaynard v. Mego Corp., 633 F.2d 1026 (2d Cir. 1980)	7
Kinney v. International Union of Operating Engineers Local 150, 994 F.2d 1271 (7th Cir. 1993)	12
Kinney v. Pioneer Press, 881 F.2d 485 (7th Cir. 1989)	7, 8
Kobell v. Suburban Lines, 731 F.2d 1076 (3d Cir. 1984)	9, 10
LCF, Inc. v. NLRB, 129 F.3d 1276 (D.C. Cir. 1997)	15
Lee Lumber Building Material Corp. v. NLRB, 117 F.3d 1454 (D.C. Cir. 1997)	18
McLeod v. General Electric Co., 366 F.2d 847 (2d Cir. 1966), *vacated on other grounds*, 385 U.S. 533 (1967)	19

TABLE OF AUTHORITIES—Continued

	Page
Micrometl Corp., JD-101-98 (June 19, 1998)	12-13
Miller v. California Medical Center, 19 F.3d 449 (9th Cir. 1994)	7, 8
Miller v. LCF, Inc., 147 L.R.R.M. (BNA) 2911 (N.D. Cal. 1994)	15
Pascarell v. Vibra Screw, Inc., 904 F.2d 874 (3d Cir. 1990)	10
Porter v. Warner Holding Co., 328 U.S. 395 (1946)	6, 7, 11, 16
Pye v. Jordan Marsh Stores Corp., 94-11509EFH (D. Mass. July 29, 1994)	13
Pye v. Sullivan Brothers Printers, 38 F.3d 58 (1st Cir. 1994)	7
Roth v. Lutheran General Hospital, 57 F.3d 1446 (7th Cir. 1995)	5
Sierra Club, Lone Star Chapter v. FDIC, 992 F.2d 545 (5th Cir. 1993)	5
Skyline Distributors v. NLRB, 99 F.3d 403 (D.C. Cir. 1996)	18
Spentonbush/Red Star Cos. v. NLRB, 106 F.3d 484 (2d Cir. 1997)	17
Virginia Carolina Tools, Inc. v. International Tool Supply, Inc., 984 F.2d 113 (4th Cir.), *cert. denied*, 508 U.S. 960 (1993)	5
Walmer v. United States DOD, 52 F.3d 851 (10th Cir.), *cert. denied*, 516 U.S. 474 (1995)	5
Webcor Packaging, Inc., cert. denied, 118 S. Ct. 1035 (1998)	2
Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982)	6, 10
White Cap, Inc., 325 N.L.R.B. No. 220 (July 24, 1998)	13
Yakus v. United States, 321 U.S. 414 (1944)	11
DOCKETED CASES	
Albertson's, Inc. v. Hallie Kirkingburg, No. 98-591 (U.S.)	2

TABLE OF AUTHORITIES—Continued

STATUTES	Page
National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*	2
29 U.S.C. § 160(j)	2, 7, 8
Section 10(j) of the Taft-Hartley Act, Pub. L. No. 80-101, c. 120 Title I § 101, 61 Stat. 136	8
MISCELLANEOUS	
Fred Feinstein, Acting General Counsel, NLRB, Report on Utilization of § 10(j) Injunction Proceedings March 3, 1994 through March 2, 1998 2, n.3 (July 23, 1998)	13, 19
Hearing before the Subcomm. on Human Resources of the House Gov't Reform and Oversight Comm., 105th Cong., 1st Sess. (July 24, 1997) (Statement of William B. Gould, IV, Chairman, NLRB), *reprinted in*, Daily Lab. Rep. (BNA) No. 143, at E-5 (July 25, 1997)	16-17
62 NLRB Ann. Rep. (1997)	17
NLRB General Counsel's Report, Oct. 1, 1995, Through March 31, 1996, *reprinted in* Daily Lab. Rep. (BNA) No. 226 E-1 (Nov. 22, 1996)	14
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BRIEF *AMICI CURIAE* OF LPA AND THE AMERICAN TRUCKING ASSOCIATION, INC. IN SUPPORT OF PETITIONER

LPA and the American Trucking Association, Inc. (ATA) respectfully submit this brief *amici curiae* with the consent of all parties.[1] The brief supports the petition for writ of certiorari.

INTEREST OF THE *AMICI CURIAE*

LPA is an organization of the senior human resources officers of over 250 of the nation's largest private sector

[1] Counsel for *amici curiae* LPA and ATA authored this brief in its entirety. No person or entity other than LPA and ATA made a monetary contribution to the preparation of the brief.

employers, collectively employing more than 12 million Americans. Since its founding in 1939, LPA has been concerned exclusively with the development of laws and policies relating to employment. LPA's mission is to ensure that laws and policies affecting labor relations are sound, practical, and responsive to the realities of the modern workplace.

ATA, a not-for-profit corporation, is a trade association of motor carriers, state trucking associations, and national trucking conferences, created to promote and protect the interests of the trucking industry. ATA membership includes more than 3,700 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents over 34,000 companies and every type and class of motor carrier in the United States.

All of LPA's and ATA's members are employers subject to the National Labor Relations Act (NLRA or the Act), 29 U.S.C. §§ 151 *et seq.*, and therefore subject to the injunction provisions at 29 U.S.C. § 160(j) (Section 10(j)). Proceedings under this section, which empowers federal courts to issue temporary injunctions against employers, often can result in court-ordered personnel and management decisions that cost a company time, money, and public good will *without a full adjudication of the facts and circumstances surrounding the case.* As such, LPA and ATA are especially concerned about the legal standards under which such injunctions are issued.

Because of their interest in the development of the nation's labor laws, LPA and ATA have participated as *amicus curiae* on many labor law issues in cases before this Court, the United States Courts of Appeals, and the NLRB.[2] Thus, LPA and ATA have an interest in, and

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[2] *E.g., Webcor Packaging, Inc. v. NLRB, cert. denied,* 118 S. Ct. 1035 (1998); *Chemical Waste Mgmt. v. Hunt,* 504 U.S. 334 (1992); *Albertson's, Inc. v. Hallie Kirkingburg,* No. 98-591 (U.S.) (decision pending); *Electromation v. NLRB,* 35 F.3d 1148 (7th Cir. 1994).

familiarity with, one of the major issues presented in this case: the standard under which courts issue injunctions under Section 10(j).

STATEMENT OF THE CASE

The facts of the case are set out fully by Petitioner.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The Third Circuit's two-pronged test for issuing injunctions under Section 10(j) of the NLRA is fundamentally contrary to well-established equitable principles and Supreme Court precedent and should be reviewed by the Court.

It is well settled that the appropriateness of preliminary injunctive relief is controlled by a comprehensive balancing of well-defined equitable principles. Every federal court of appeals, including the Third Circuit, has adopted a test that weighs four factors—the likelihood of success on the merits, the extent of harm that would result from denying the requested relief, the extent of harm that would result from granting the relief, and the public interest.

Although this Court has never ruled on the appropriate standard for 10(j) relief, the Court has authoritatively decided that the full scope of equitable factors should be considered when courts are asked to exercise equitable powers under a statute, unless the statute clearly limits or modifies the relevant considerations. The NLRA provides no such limits.

Despite clear guidance from this Court, the Third Circuit has completely abandoned traditional equitable principles in 10(j) cases in favor of a *de minimus* two-prong test. This test, which in no way reflects the traditional inquiry, requires merely that the Board demonstrate that (1) there is "reasonable cause" to believe that an unfair labor practice has occurred; and (2) the relief sought is "just and proper."

As this Court previously has recognized, the power of the federal courts to grant or withhold equitable relief under a federal statute is an important question deserving review by the Court. This proposition is especially true, however, with respect to 10(j) relief, which is exercised without the benefit of a full adjudication of the facts, involves large-scale, high-cost consequences, and implicates the interests of third parties not associated with the proceedings. Moreover, review of the issue is especially important at this time, in light of the Board's recent aggressive use of 10(j) injunctions and dismal success rate in the courts of appeals.

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT'S TEST FOR ISSUING 10(j) INJUNCTIONS IS FUNDAMENTALLY CONTRARY TO WELL-ESTABLISHED EQUITABLE PRINCIPLES AND SUPREME COURT PRECEDENT AND SHOULD BE REVIEWED BY THE COURT

A. The Appropriateness of Preliminary Injunctive Relief—Such as That Authorized by Section 10(j) of the NLRA—Is Controlled by a Comprehensive Balancing of Well-Established Equitable Principles

It is well settled that the appropriateness of preliminary injunctive relief is controlled by a comprehensive balancing of well-defined equitable principles. In determining whether preliminary injunctive relief is warranted, every federal court of appeals has adopted a test that in some form or another weighs the following factors:

(1) the likelihood of success on the merits;

(2) the likelihood and extent of harm that would result if the injunction was not issued;

(3) the likelihood and extent of harm that would result from granting the injunction; and

(4) the public interest in issuing the injunction.[3]

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[3] *EEOC v. Astra USA*, 94 F.3d 738 (1st Cir. 1996); *International Bhd. of Teamsters v. Local Union No. 810*, 19 F.3d 786 (2d Cir.

Even the Third Circuit, which refused to apply the test here, has categorically and unequivocally stated that:

> This Court has consistently identified four factors which must be examined in ascertaining the propriety of a preliminary injunction: . . . the moving party must generally show (1) a reasonable probability of eventual success in the litigation and (2) that the movant will be irreparably injured *pendente lite* if relief is not granted. . . . Moreover, . . . the district court "should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest." . . . While these factors structure the inquiry, however, no one aspect will necessarily determine its outcome. Rather, proper judgment entails a "delicate balancing" of all elements

Eli Lilly & Co., 630 F.2d at 136 (citations omitted).

Because preliminary injunctive relief requires an adjustment of the rights of the parties *without a full adjudication of the facts*, federal courts consistently and uniformly have considered *all* the relevant factors carefully before granting or denying such relief. As the Third Circuit indicates, no single factor is dispositive or dispensable.

1994); *Eli Lilly & Co. v. Premo Pharm. Labs. Inc.*, 630 F.2d 120 (3d Cir.), *cert. denied*, 449 U.S. 1014 (1980); *Virginia Carolina Tools, Inc. v. International Tool Supply, Inc.*, 984 F.2d 113 (4th Cir.), *cert. denied*, 508 U.S. 960 (1993); *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545 (5th Cir. 1993); *Dayton Area Visually Impaired Persons v. Fisher*, 70 F.3d 1474 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 1421 (1996); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446 (7th Cir. 1995); *Hill v. Xyquad, Inc.*, 939 F.2d 627 (8th Cir. 1991); *Johnson v. Cal. State Bd. of Accountancy*, 72 F.3d 1427 (9th Cir. 1995); *Walmer v. United States DOD*, 52 F.3d 851 (10th Cir.), *cert. denied*, 516 U.S. 474 (1995); *Gold Coast Pubs. v. Corrigan*, 42 F.3d 1336 (11th Cir. 1994), *cert. denied*, 516 U.S. 337 (1995); *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738 (D.C. Cir. 1975); *Bio-Tech. Gen. Corp. v. Genentech, Inc.*, 80 F.3d 1553 (Fed. Cir.), *cert. denied*, 519 U.S. 911 (1996).

Moreover, that all thirteen circuits have arrived at substantially the same test is no coincidence. "We are dealing here with the requirements of equity practice with a background of several hundred years of history." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). The equitable practices established by the federal courts have been tried, tested, and refined through iteration upon iteration. As this Court has noted, "[w]e do not think that . . . a major departure from that long tradition should be lightly implied." *Id.* at 330.

B. This Court Has Authoritatively Decided That Traditional Equitable Principles Apply to Injunctive Relief Under a Federal Statute Unless the Statute Itself Limits the Applicability of Such Factors

This Court has authoritatively decided that, in exercising their equitable jurisdiction, federal courts should apply traditional equitable considerations and powers to tailor relief to the particular facts of the case, unless the statute under which the equitable juirsdiction is conferred clearly limits or modifies those factors.

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and compete exercise of that [equitable] jurisdiction.
>
> * * * *
>
> Power is thereby resident in the District Court in exercising this jurisdiction, "to do equity and mould each decree to the necessities of the particular case."
>
> * * * *
>
> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command.

Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (citations omitted). *See also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982); *Brotherhood of Locomotive Eng'rs v. Missouri-Kansas-Texas R. Co.*, 363

U.S. 528, 532 (1960). "The great principle of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction. . . . Only in that way can equity do complete rather than truncated justice." *Porter*, 328 U.S. at 398.

Thus, it is well-settled that unless the statute clearly indicates otherwise, courts must thoroughly examine the full scope of equitable considerations when asked to exercise equitable power such as preliminary injunctive relief.

C. Section 10(j) of the NLRA Does Not Limit the Application of Traditional, Well-Established Equitable Principles, but Rather Endorses Their Use

Section 10(j) of the NLRA provides:

> The Board shall have the power, upon issuance of a complaint . . . to petition any United States district court . . . for appropriate temporary relief or restraining order. Upon the filing of any such petition, the Court . . . shall have jurisdiction to grant the Board such temporary relief or restraining order as it deems just and proper.

29 U.S.C. § 160(j).

Consistent with the language of this section, four circuits—the First, Second, Seventh, and Ninth—have interpreted this provision essentially as a grant of *jurisdiction* to the federal courts to hear and decide appropriate cases *using traditional equitable rules and principles. Pye v. Sullivan Bros. Printers*, 38 F.3d 58 (1st Cir. 1994); *Kaynard v. Mego Corp.*, 633 F.2d 1026 (2d Cir. 1980); *Kinney v. Pioneer Press*, 881 F.2d 485 (7th Cir. 1989); *Miller v. California Med. Ctr.*, 19 F.3d 449 (9th Cir. 1994).[4]

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[4] The District Court for the District of Columbia also has applied the traditional test, *D'Amico v. U.S. Serv. Indus., Inc.*, 867 F. Supp. 1075 (D.D.C. 1994), as has the most recent district court decision from the Fourth Circuit. *D'Amico v. Townsend Culinary, Inc.*, 159 L.R.R.M. (BNA) 2455 (D. Md. 1998). The District of Columbia

These circuits all have applied the traditional four-factor test to determine whether preliminary injunctive relief is appropriate. These courts, in conformity with this Court's doctrine, have applied the full scope of equitable factors to 10(j) cases because the statute does not indicate that consideration of such factors should be limited. Indeed, relying on this principle, both the Seventh and Ninth Circiuts overruled prior deicsions that did not reflect the traditional inquiry. *Kinney,* 881 F.2d at 491; *Miller,* 19 F.3d at 457.

The reasoning of these decisions clearly estabilsh that the NLRA places no limits on the use of traditional equitable factors in determining the appropriateness of 10(j) relief. At the petition stage, an in depth discussion of the merits of this issue is somewhat premature. Nevertheless, to resolve this question one need consider nothing more than the last clause of Section 10(j)—that "the Court . . . shall have jurisdiction to grant the Board such . . . relief . . . *as it deems* just and proper." 29 U.S.C. § 160(j). As one can see, Congress did not intend to limit the court's equitable discretion, but rather, explicitly dedicated the issue to the court's discretion. As such, Section 10(j) can only be construed as an *endorsement* of the traditional principles.[5]

Because the statute does not limit the applicability of traditional equitable factors in the 10(j) context, those

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and Fourth Circuits, however, have not definitively ruled on the issue. *See U.S. Serv. Indus.*, 867 F. Supp. at 1082; *Townsend Culinary*, 159 L.R.R.M. at 2459.

[5] Section 10(j) was added to the NLRA in 1947 by the Taft-Hartley Act, Pub. L. No. 80-101, c. 120, Title I § 101, 61 Stat. 136, 146, just one year after this Court's decision in *Porter*. As this Court has recognized, where subsequent laws have been enacted, there is a "presumption that Congress was aware of [prior] judicial interpretations and, in effect, adopted them." *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2286 (1998). In light of *Porter*, it defies credulity to conclude that Congress intended to limit the applicability of the traditional factors by the Section 10(j) language.

factors must be considered by the district courts in determining the appropriateness of 10(j) relief.

D. The Third Circuit Has Completely Abandoned the Traditional, Well-Established Principles Governing the Appropriateness of Injunctions in Cases Arising Under Section 10(j)

Despite its forceful endorsement of using traditional equitable principles to "ascertain[] the propriety of preliminary injunction[s]" in other contexts, *Eli Lilly*, 630 F.2d at 136, the Third Circuit has completely abandoned those principles in 10(j) cases.

Instead, the Third Circuit has adopted a two-prong test requiring the Board to demonstrate merely that (1) there is reasonable cause to believe that an unfair labor practice has occurred and (2) that the relief sought is just and proper. *Kobell v. Suburban Lines*, 731 F.2d 1076, 1078 (3d Cir. 1984).[6] This two-part inquiry in no way mirrors the thorough analysis required by the traditional four-factor test.

To meet the "reasonable cause" prong of the Third Circuit test, the Board need only satisfy two *de minimus* requirements.

> First, there must be a *substantial, non-frivolous, legal theory,* implicit or explicit, in the Board's argument, and second, *taking the facts favorably to the Board,* there must be sufficient evidence to support that theory.

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[6] The Fifth, Sixth, Tenth, and Eleventh Circuits have adopted approaches similar to that of the Third Circuit. *See Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1189-93 (5th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976); *Gottried v. Frankel*, 818 F.2d 485, 495 (6th Cir. 1987); *Angle v. Sacks*, 382 F.2d 655, 660 (10th Cir. 1967); *Dowd v. International Longshorman's Ass'n*, 975 F.2d 779 (11th Cir. 1992). We believe that the split between these courts, and the First, Second, Seventh, and Ninth Circuits, by itself warrants review by this Court. Petitioner, however, has thoroughly briefed this point, (Pet'n at 6-13), and we need not repeat those arguments here.

Pascarell v. Vibra Screw, Inc., 904 F.2d 874, 882 (3d Cir. 1990). The Third Circuit itself confesses that under this test, "the burden of proof faced by the [NLRB] is 'relatively insubstantial.'" *Suburban Lines*, 731 F.2d at 1084.

The second prong of the Third Circuit test requires that the Board establish that the injunctive relief is "just and proper." Although the Third Circuit has been less than clear in defining this phrase, the essence of the inquiry is whether a failure to grant 10(j) relief "would prevent the Board . . . from effectively exercising ultimate remedial powers." *Suburban Lines*, 731 F.2d at 1091-92. In any event, whatever meaning is attributed to "just and proper," it is clear that in the Third Circuit it does not incorporate traditional principles, as "interim injunctive relief may be granted under section 10(j) without the showing of irreparable harm and a likelihood of success on the merits, which are the ordinary requisites for a preliminary injunction." *Id.* at 1078.

Because the Third Circuit, in 10(j) cases, has completely abandoned traditional, well-established equitable principles in contravention of the clear guidance from this Court, the Court should review the ruling below in this case.

II. THE PROPER STANDARD FOR ISSUING 10(j) RELIEF IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE RESOLVED BY THIS COURT

As this Court previously has recognized, the "power of the federal courts to grant or withhold equitable relief for violations" of federal statutes is "an important question" deserving review by this Court. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1992). For the reasons stated below, this proposition is *especially* true regarding 10(j) injunctions.

A. 10(j) Relief Is Preliminary in Nature and Necessarily Issued Prior to a Full Adjudication of the Case

This Court has recognized that, in order to "secur[e] complete justice," *Porter*, 328 U.S. at 1089, courts must examine the full array of equitable factors before exercising *any* equitable powers. This proposition is especially valid with respect to preliminary injunctive relief, such as that authorized by Section 10(j).

This is because preliminary relief is exercised without the benefit of a full adjudication of the facts of the case. As such, "the award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even where irreparable injury might otherwise result . . ." *Yakus v. United States*, 321 U.S. 414, 440 (1944). Rather, in order to ensure that injustice is not done in the early stages of litigation, courts consistently have required at least some showing on the likelihood of success on the merits. Even the Third Circuit has stated:

> The furthest we have gone in easing this standard is our statement that "where factors of irreparable harm, interests of third parties and public considerations strongly favor the moving party, an injunction might be appropriate 'even though plaintiffs did not demonstrate *as strong* a likelihood of ultimate success as would generally be required." However, we have never gone so far as to depart from our established standard that a moving party must show a "reasonable probability of eventual success in the litigation."

In Re Arthur Treacher's Franchisee Litigation, 689 F.2d 1137, 1147 (3d Cir. 1982) (emphasis in original; citations omitted).

Like all preliminary relief, the 10(j) injunction is "an extraordinary tool because it injects the legal system into disputes before a full airing of the facts and a careful consideration of the law, and mistakes can be costly."

Kinney v. International Union of Operating Eng'rs Local 150, 994 F.2d 1271, 1277 (7th Cir. 1993). Thus, consideration of all the traditional factors—including probability of success on the merits—is no less important in 10(j) cases than in other contexts. On the contrary, as the First Circuit explains, because in 10(j) cases "the interim relief sought by the Board is essentially the final relief sought, the likelihood of success should be strong." *Asseo v. Pan Am. Grain Co.,* 805 F.2d 23, 29 (1st Cir. 1986).

Finally, we note that the danger inherent in the Third Circuit's approach is not limited to its failure to recognize the interlocutory nature of 10(j) relief. Rather, this danger is compounded because the Third Circuit treats the facts as *fully adjudicated*—accepting them as alleged by the Board.

Thus, although the proper exercise of any equitable power presents an important question of law, because 10(j) relief *always* requires an exercise of that power before a resolution on the merits, the proper standard for 10(j) relief is especially important.

B. The Unfair Labor Practice Complaint Is Just the First Step in an Adjudicative Process That Involves Many Stages and Levels

The unfair labor practice complaint, upon which 10(j) proceedings are based, is merely the first step in an adjudicative process that involves many stages including hearing and recommendation by an administrative law judge (ALJ), review and decision by the NLRB, and judicial review by the courts of appeals. At any of these stages of the process, the General Counsel's view of the facts and the law may be, and often is, rejected. It is not uncommon for an ALJ to rule against the General Counsel because of a different view of the facts, the law, or both. *E.g., Fresh Mark, Inc., d/b/a Carriage Hill Foods,* JD-82-98 (June 8, 1998); *Micrometl Corp.,* JD-101-98 (June

19, 1998). Similarly, it is not uncommon for the Board to overturn an ALJ decision that found in favor of the General Counsel. *E.g., Diva Ltd.*, 325 N.L.R.B. No. 152 (May 22, 1998); *White Cap, Inc.*, 325 N.L.R.B. No. 220 (July 24, 1998). Furthermore, as discussed *infra* section II.E., NLRB rulings often are reversed by a reviewing court.

As one can easily see, Congress clearly recognized that there often may be a great disconnect between prosecutorial perception [7] and factual (or legal) reality, and there are numerous cases that concretely illustrate this point.

For example, in *Clark v. Fieldcrest Cannon, Inc.*, 1994 U.S. Dist. LEXIS 20979 at *5 (M.D.N.C. Aug. 25, 1994), the Board sought 10(j) relief to reinstate workers *allegedly* fired for union activity. After a full ALJ hearing, review by the Board, and subsequent review by the Fourth Circuit, however, it ultimately was determined that three of the workers for which 10(j) relief was sought actually were terminated for various forms of misconduct. One worker was terminated for reporting to work drunk on several occasions; another for behavior that "ranged from murderous threats to sexual harassment;" and the third for "cheating on production." [8] *Fieldcrest Cannon v. NLRB*, 97 F.3d 65, 73-74 (4th Cir. 1996).

Similarly, in *Pye v. Jordan Marsh Stores Corp.*, 94-11509EFH (D. Mass. July 29, 1994), the Board again sought 10(j) relief to reinstate an "unlawfully" fired sales-

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[7] Although the NLRB General Counsel must obtain authorization from the Board before seeking 10(j) relief, statistics indicate that such authorization is largely a formality. Since 1980, when statistics first became available, the Board has authorized 10(j) proceedings in 9 of 10 requests. Fred Feinstein, Acting General Counsel, NLRB, Report on Utilization of § 10(j) Injunction Proceedings March 3, 1994 through March 2, 1998 2, n.3 (July 23, 1998).

[8] This worker operated her towel machine "without towels in it, thereby increasing her production and pay."

person. After an ALJ hearing and review by the Board, however, it was determined that the company fired the worker for stealing the commission of an employee on sick leave. *Jordan Marsh Stores Corp.*, 317 N.L.R.B. 460, 471-76 (1955). It is worth noting that this case was decided in a circuit that applies the traditional test. It is not unreasonable to speculate that, in the Third Circuit, 10(j) relief may have been granted.

We also note that at least in these examples—where the Board's case simply turned out to be factually wrong—the complaints at issue were based on indisputable interpretations of the law. However, the General Counsel often issues complaints where the law is unsettled, or where the General Counsel believes the Board may be inclined to overturn precedent. *See, e.g.*, NLRB General Counsel's Report, Oct. 1, 1995, Through March 31, 1996, *reprinted in* Daily Lab. Rep. (BNA) No. 226 E-1, E-4-5 (Nov. 22, 1996) ("We concluded that, after contract expiration, a provision for dues checkoff, like any other mandatory term and condition of employment, remains subject to bargaining before it can be changed. Case law to the contrary was deemed distinguishable or wrongly decided.")

Thus, although the issuance of a complaint is a prerequisite for 10(j) relief, this factor was never intended by Congress to be controlling regarding the appropriateness of such relief. The Third Circuit's approach, which takes such complaints at face value with respect to both fact and law, shows no cognizance of this important consideration.

C. 10(j) Injunctions Often Involve Large-Scale, High-Cost Consequences

The proper standard for 10(j) relief also takes on added importance because such cases often implicate large-scale, high cost personnel and management actions. For example, an injunction recently sought by the Board

in Michigan would have required that the company spend more than $6 million to restore certain operations that had been subcontracted out, even though the company had lost $16 million on those operations during the previous 18 months and 97 percent of the subcontracted work went to unionized firms. *Calatrello v. Automatic Sprinkler Corp. of Am.*, 55 F.3d 208 (6th Cir. 1995).

A similar case, filed by the Board in California, sought to enjoin the company from closing a facility before a union representation election, even though that operation had lost millions of dollars and had been put on "probation" by the company before any union activity had begun. *Miller v. LCF, Inc.*, 147 L.R.R.M. (BNA) 2911 (N.D. Cal. 1994). Again, it is worth noting that the employer was ultimately vindicated on the merits and the relief sought by the General Counsel was denied. *LCF, Inc. v. NLRB*, 129 F.3d 1276 (D.C. Cir. 1997).

As these examples demonstrate, 10(j) injunctions—temporary though they may be—often involve large-scale, high-cost consequences. As a result, the appropriate standard for issuing such relief is an important question that warrants review by this Court.

D. 10(j) Injunctions Often Implicate the Interests of Third Parties Not Asssociated With the Proceedings

It is also not uncommon for 10(j) relief to implicate the interests of third parties not associated with the 10(j) proceedings. As the case at bar illustrates, interested third parties often include workers who lose jobs to accommodate 10(j) reinstatement orders. Often, these reinstatement orders can affect hundreds of workers. And although 10(j) relief is "temporary" in nature, the effects of that relief on the displaced workers—such as lost income, expended savings, relocation, and other ancillary effects of lost employment—are nonetheless permanent. Moreover, one must remember that reinstatement, backpay, interest and other such "make whole" remedies are

not available to these third parties where Board allegations eventually are proven untrue.

The effects of 10(j) injunctions are not limited to displaced employees, however, and the relief sought by the Board often affects the interests of other parties as well. For example, in *Automatic Sprinkler,* discussed above, the relief sought by the NLRB directly affected the subcontractors who were threatened with the loss of lucrative contracts.

As this Court has stated, "it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all . . . whose interests the injunction may affect." *Brotherhood of Locomotive Eng'rs v. Missouri-Kansas-Texas R. Co.,* 363 U.S. 528, 532 (1960), *quoting Inland Steel Co. v. United States,* 306 U.S. 153, 157 (1939). In this regard, a court of equity may need to "act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest." *Porter,* 328 U.S. at 398.

Because 10(j) cases often involve the competing interests of parties not associated with the proceedings, the proper standard for granting such relief is an important question that deserves review by this Court.

E. NLRB Decisions Have Been Particularly Unsuccessful in Federal Courts

Finally, we point out that approving Board legal theories and factual allegations as a matter of course in 10(j) cases, as the Third Circuit approach does, simply is not justified by the NLRB's recent track record in the federal courts.

According to the agency, in 1994, 37 percent of all Board decisions reviewed by the circuit's were reversed or remanded in whole or in part. *Hearing before the Subcomm. on Human Resources of the House Gov't Re-*

form and Oversight Comm., 105th Cong., 1st Sess. (July 24, 1997) (statement of William B. Gould, IV, Chairman, NLRB, at 5), *reprinted in*, Daily Lab. Rep. (BNA) No. 143, at E-5, E-7 (July 25, 1997). In 1995, the Board fared even worse, getting reversed in whole or in part nearly 40 percent of the time. *Id.* In 1996 and 1997, the reversal rates were 34 and 30 percent, respectively. *Id.*; 62 NLRB Ann. Rep. 159, Table 19A (1997).

Furthermore, these Courts increasingly have accompanied the reversals with sharp criticism of the Board. For example, reviewing the Board's determination that tug boat captains were *not* supervisors, the Second Circuit refused to accept the NLRB's "warped interpretation of the facts," concluding:

> . . . the Board's biased mishandling of cases involving supervisors increasingly has called into question our obeisance to the Board's decisions in this area. . . . [T]he Board's manipulation of the definition of supervisor has reduced the deference that would otherwise be accorded its holdings.

Spentonbush/Red Star Cos. v. NLRB, 106 F.3d 484, 488 (2d Cir. 1997). One year earlier, that same court scolded the Board in *Harpercollins San Francisco v. NLRB*, 79 F.3d 1324, 1332 (2d Cir. 1996), that:

> The NLRB may not, as it has here, totally disregard circumstances subsequent to the ULPs that weight against the imposition of a bargaining order. . . . Specifically, the NLRB has once again flouted the mandates of this circuit and has ignored our consistent holdings . . .

The D.C. Circuit, which reviews a large number of Board decisions, has been highly critical on numerous occasions.

> As a consequence of [the Board's] stubborn refusal to accept the holdings of virtually every circuit that has considered the matter, it has squandered a vast

> amount of our time as well as its own and has caused delays in the ultimate resolution of cases that cannot be laid at the feet of recalcitrant employers.

Charlotte Amphitheater Corp. v. NLRB, 82 F.3d 1074, 1079 (D.C. Cir. 1996).

> [T]he Board's decision to issue a bargaining order in this case is so lacking evidentiary support and reasoned decisionmaking that it seems whimsical.

Skyline Distribs. v. NLRB, 99 F.3d 403, 410 (D.C. Cir. 1996). The Board's decision in *Skyline* was so lacking in legal merit that a concurring judge opined:

> We would not tolerate this kind of intransigence on the part of other litigants and I do not understand why the Board should receive special treatment.

Id. at 412 (Henderson, J., concurring).

Similarly, in *Lee Lumber Building Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997), the court observed:

> Case law in our circuit is as clear as it could be on this question. The Board, however, continues to ignore us. We continue to reverse.

A concurring judge in that case characterized the Board's position as "simply a way to tell this Circuit to go fly a kite." *Id.* at 1463 (Silberman, J. concurring).

Even the Third Circuit recently articulated similar exasperation with the Board:

> [I]t is especially unfortunate when the Board puts forth such a patchwork of adjudications without adequate rationalization, thereby abandoning potential litigants inside a maze of decisions with no means to map an exit. . . . [W]e do not question [the Board's] mandate. But, as we have noted, in fashioning a new rule, the Board's authority is not without boundaries. The Board may not, by *ipse dixit*, simply issue new rules (or "interpret" its old ones) without

> explaining the reason for their issuance (or reinterpretation) . . .

Bro-Tech Corp. v. NLRB, 105 F.3d 890, 896-97 (3d Cir. 1997).

Thus, even with the benefits of a full hearing on the facts, full briefings on the application of the law to the facts, and deferential standards of review, one in three Board decisions is found to be wrong and, in many cases, blatantly so. In light of these factors, the Third Circuit's conclusion that 10(j) relief should issue without regard to the merits of the case clearly should be examined by this Court.

F. The NLRB Has Dramatically Increased Its Use of 10(j) Injunctions in Recent Years

For many years, it was well-recognized that 10(j) relief should be used "not as a broad sword, but as a scalpel, ever mindful of the dangers in conducting labor management relations by way of injunction." *McLeod v. General Electric Co.*, 366 F.2d 847, 849-50 (2d Cir. 1966) (quoting Frank McCulloch, Chairman, NLRB), *vacated on other grounds*, 385 U.S. 533 (1967). Nevertheless, in recent years, the NLRB has increased 10(j) use by 250 percent.

For example, during the 41 year period between 1953 and 1993, the Board instituted an average of 21 10(j) proceedings annually. NLRB Ann. Reps. (1953 through 1993). Since 1994, however, the Board has instituted an average of 73 such proceedings, more than tripling its four-decade average. Fred Feinstein, Acting General Counsel, NLRB, Report on Utilization of § 10(j) Injunction Proceedings March 3, 1994 through March 2, 1998 (July 23, 1998) (indicating that the NLRB brought 292 10(j) actions during this four year period).[9]

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[9] For further insight on the NLRB's increased use of 10(j) injunctions in recent years, *see* Herbert R. Northrup & H. Lane

We believe that the Board's recent aggressive use 10(j) proceedings further heightens the importance of the question presented to the Court in this case.

Despite the fact that Section 10(j) has been in place since 1947, this Court has not had an opportunity to address the proper standard for issuing 10(j) relief. For these fifty years, this question has posed a recurring and continuous problem for employers, regardless of the outcome of any particular case. This is because, in practical terms, the legal standard for 10(j) relief is omnipresent, and inapplicable only until the company's next business decision. This important question has escaped the Court's review for too long. The Court should resolve the issue in this case.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the petition for writ of certiorari should be granted by the Court.

Respectfully submitted,

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Dennard, The Return of Government by Injunction? Public Policy and the Expansive Use of Section 10(j) of the NLRA, 22 Employee Rel. L.J. 101, 110 (Summer 1996).

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In The
Supreme Court of The United States
October Term 1997

BEVERLY HEALTH AND REHABILITATION SERVICES, INC., et al.
Petitioners,

v.

GERALD KOBELL, Regional Director for Region Six of the National Labor Relations Board for and on behalf of THE NATIONAL LABOR RELATIONS BOARD
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

I. SCOPE OF REPLY 1

II THIS CASE IS NOT MOOT SINCE THE EXPIRED PRELIMINARY INJUNCTION HAS COLLATERAL CONSEQUENCES THAT CAN SERIOUSLY INJURE PETITIONER. 2

III. THE PETITION ALSO IS NOT MOOT SINCE THE UNDERLYING ISSUE IS CAPABLE OF REPETITION INVOLVING THE SAME PARTIES BUT MAY EVADE REVIEW BECAUSE OF THE INHERENTLY SHORT DURATION OF A PRELIMINARY INJUNCTION. 5

IV. CONCLUSION 10

TABLE OF AUTHORITIES

CASES	PAGE
American Commercial Lines, Inc., 291 NLRB 1066 (1988)	3
Beverly California Corp., 310 NLRB 222 (1993)	4, 7
Beverly California Corp., 326 NLRB No. 29 (1998)	4, 7
Beverly California Corp., 326 NLRB No. 30 (1998)	4, 7
Burlington Northern R. Company v. Brotherhood of Maintenance of Way Employees, 481 U.S. 429, 107 S. Ct. 1841 (1987)	7
Eisenberg v. Hartz Mountain Corp., 519 F.2d 138 (3rd Cir. 1975)	5
Fry Foods, Inc., 256 NLRB 137 (1981)	3
Honig v. Doe, 484 U.S. 305, 108 S. Ct. 592 (1988)	3,6
International Organization of Masters, Mates & Pilots v. Brown, 498 U.S. 466, 111 S. Ct. 880 (1991)	8
Local No. 8-6, Oil, Chemical & Atomic Workers Intern. Union v. Missouri, 361 U.S. 363, 80 S. Ct. 391 1960)	8
Los Angeles County v. Davis, 440 U.S. 625, 99 S. Ct. 1379 1979)	8
McLeod v. General Electric Co., 385 U.S. 533, 87 S. Ct. 637 (1967)	8, 10

Miller v. California Pacific Medical Center,
19 F.3d 449 (9th Cir. 1994) 5, 9
Nebraska Press Ass'n v. Stuart,
427 U.S. 539, 96 S. Ct. 2791 (1976) 6
NLRB v. Washington Heights-West-Inwood
Mental Health Coun.
897 F.2d 1238 (2nd Cir. 1980) 1
Reliance Ins. Co. v. Mast Const. Co.,
84 F.3d 372 (10th Cir. 1996) 3
S.E.C. v. Sloan,
436 U.S. 103, 98 S. Ct. 1702 (1978) 9
Seminole Intermodal Transport, Inc.,
312 NLRB 236 (1983) 3
Sibron v. State of New York,
392 U.S. 40, 88 S. Ct. 1889 (1968) 2, 3
Southern Pacific Terminal Co. v. ICC,
219 U.S. 498, 31 S. Ct. 279 (1911) 6
Super Tire Engineering Co. v. McCorkle,
416 U.S. 115, 94 S. Ct. 1694 (1974) 2, 7
Szabo v. U.S. Marine Corp.,
819 F.2d 714 (7th Cir. 1987) 3
Torrington Extend-A-Care Employee
Association v. NLRB,
17 F.3d 580 (2nd Cir. 1994) 4
U.S. v. W.T. Grant Co.,
345 U.S. 629, 73 S. Ct. 894 (1953) 8
University of Texas v. Camenisch,
451 U.S. 390, 101 S. Ct. 1830 (1981) 8
Weinstein v. Bradford,
423 U.S. 147, 96 S. Ct. 347 (1975) 6

I. SCOPE OF REPLY

This Reply Brief addresses only the new issue that the National Labor Relations Board ("Board") raises with respect to mootness.[1] For the reasons discussed herein, the expiration of the underlying injunction does not make the Petition moot. The expired injunction has collateral consequences that are harmful to Petitioner. Moreover, the issues raised in this case are capable of repetition yet evading review by this Court.[2]

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[1] The Opposition Brief states at several points (pp. 5 and 8) that the Union's strike was an "unfair labor practice strike" entitling strikers to immediate reinstatement at the end of the strike. The Board's Brief fails to note, however, that this obligation to immediately reinstate strikers does not apply if the strike itself was illegal under Section 8(g). NLRB v. Washington Heights-West Harlem-Inwood Mental Health Coun. 897 F.2d 1238, 1247-48 (2nd Cir. 1980).

[2] As an alternative ground for mootness, the Opposition Brief notes that Beverly has agreed to reinstate strikers in a manner consistent with the 10(j) injunction regardless of the outcome of this litigation. The "capable of repetition yet evading review" doctrine and the "collateral consequences" doctrine apply with equal force to this alternative ground for mootness. Accordingly, it is not necessary to separately address that argument.

II. THIS CASE IS NOT MOOT SINCE THE EXPIRED PRELIMINARY INJUNCTION HAS COLLATERAL CONSEQUENCES THAT CAN SERIOUSLY INJURE PETITIONER.

The District Court's preliminary injunction expired by its terms on May 4, 1998, but the expiration of that Order does not moot this Petition. This Court has long recognized that, even when the underlying proceeding has run its course and no further relief can be awarded, the underlying court order may have collateral consequences that extend the life of the "controversy." In numerous cases, the Court has noted that the "possibility" of collateral consequences from a court order is sufficient to keep a controversy from being moot. Sibron v. State of New York, 392 U.S. 40, 88 S. Ct. 1889 (1968) (criminal conviction); Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 94 S. Ct. 1694, 1698-99 (1974) (collateral impact on subsequent relations with union); City of Los Angeles v. Lyons, 461 U.S. 95, 101, 103 S. Ct. 1660, 1664-65 (1983) (civil rights action).

In the present case, the most obvious collateral consequence is the risk that the Board might initiate civil contempt proceedings against Beverly for alleged non-compliance with the reinstatement provisions of the preliminary injunction. The Board has notified Beverly on repeated occasions that the Board believes Beverly has not fully complied with the reinstatement provisions of the underlying preliminary injunction [Appendix pp 1-19]. While the Board's latest letter asserts that the Board does not "intend to pursue these issues in a contempt proceeding before Judge Smith" (Apdx. p. 19), there is nothing binding about this "intention" and the Board could initiate contempt proceedings

at any time.[3] This collateral consequence is certainly "possible", Sibron, 392 U.S. at 55, 88 S. Ct. at 1898-99, and is "capable" of occurring. Honig v. Doe, 484 U.S. 305, 318-319, n. 6, 108 S. Ct. 592, 601-602, n. 6 (1988).

The expired order also can adversely impact Petitioner in pending proceedings before the Board and the Courts of Appeals. Although a 10(j) injunction is not an adjudication of whether any unfair labor practice occurred, the Board in past cases has used the existence of a successful 10(j) order as evidence of employer animus or as evidence that the employer's alleged misconduct was serious in nature.[4] This is a particularly sensitive issue for Petitioner since the Board is in the process of seeking to impose an unprecedented nationwide cease-and-desist order applicable to all of the approximately 750 facilities owned and operated by Beverly. In 1993, the Board ordered precisely this relief because of the

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[3] A civil contempt proceeding can be initiated after the date that a Court order expires so long as the contempt proceeding is based on violations that allegedly occurred during the life of the underlying order. Reliance Ins. Co. v. Mast Const. Co., 84 F.3d 372, 376 (10th Cir. 1996) and cases cited therein. In some cases, the Board has sought contempt years after the date the preliminary injunction was initially entered. E.g., Szabo v. U.S. Marine Corp., 819 F.2d 714 (7th Cir. 1987) (seeking contempt in 1986 based on a preliminary injunction issued in May 1984).

[4] E.g., Fry Foods, Inc., 256 NLRB 137, 138 (1981); Seminole Intermodal Transport, Inc., 312 NLRB 236, 237 n. 3 (1983); American Commercial Lines, Inc., 291 NLRB 1066, 1071, n. 21, 1072 (1988).

Board's misperception that Beverly had a "proclivity to violate the Act." Beverly California Corp., 310 NLRB 222, 228 (1993). Even after the Court of Appeals for the Second Circuit denied enforcement to this nationwide order and affirmatively found no evidence of "an anti-union animus amounting to a proclivity to violate the Act",[5] the Board has persisted in its effort to brand Beverly as a recidivist employer whose conduct warrants a nationwide remedial order. See Beverly California Corp., 326 NLRB No. 29 (1998) (appeal pending 3rd Circuit) and Beverly California Corp., 326 NLRB No. 30 (1998) (appeal pending 7th Circuit). Moreover, the Board seeks the same order in the present administrative proceeding which is still pending before the Board. If the preliminary injunction in the present case is reversed and vacated, the Board will be unable to rely upon the injunction as support for such an extraordinary order.

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[5] Torrington Extend-A-Care Employee Association v. NLRB, 17 F.3d 580, 586 (2nd Cir. 1994). The Court concluded, in relevant part, "the proof in many cases, while sufficient to support the decision, was ambiguous, and contrary decisions would have been has sustainable. Non-hallmark violations at 3% of a Company's facilities does not show an antiunion animus amounting to a proclivity to violate the Act. Nor was there a showing that the unfair labor practices stemmed from a corporatewide labor policy . . . .[T]he only centrally coordinated labor policy shown in this case was Beverly's admitted -- and legal -- policy of opposing unionization at its facilities . . . by and large, the presence of divisional personnel in union campaigns at individual facilities appears to have had a positive effect, and Beverly should not be punished merely because isolated unfair labor practices occurred when division personnel were present. Id., at 586-87.

III. THE PETITION ALSO IS NOT MOOT SINCE THE UNDERLYING ISSUE IS CAPABLE OF REPETITION INVOLVING THE SAME PARTIES BUT MAY EVADE REVIEW BECAUSE OF THE INHERENTLY SHORT DURATION OF A PRELIMINARY INJUNCTION.

This Court has never issued a decision construing or applying Section 10(j) of the Act, and the reason why is obvious. Section 10(j) preliminary injunctions are, by their very nature, of short duration, expiring when the Board issues its administrative determination. Here, the injunction expired even earlier than usual because Third Circuit precedent requires a district court to limit the duration of a preliminary injunction to six months, plus extensions of limited duration in unique circumstances. Eisenberg v. Hartz Mountain Corp., 519 F.2d 138, 144 (3rd Cir. 1975). Given these limitations, it would be virtually impossible for a 10(j) preliminary injunction to be in effect by the time the matter makes its way to this Court through the ordinary processes.[6] Miller v. California Pacific Medical Center, 19 F.3d 449, 453 (9th Cir. 1994) (finding issues raised by an expired 10(j) injunction to be not moot). See also, Eisenberg v. Holland Rantos Co. Inc.,

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[6] In this particular case, of course, Beverly took every step it could to get this matter to this Court at an earlier stage through a motion to the Court of Appeals for the Third Circuit to stay the injunction pending appeal, and a subsequent application to this Court for a stay pending appeal (Apdx. A-1), each of which was denied.

583 F.2d 100, 103, n. 6 (3rd Cir. 1978).

It is precisely for this reason that this Court has recognized that "jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is 'capable of repetition, yet evading review'." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 546, 96 S. Ct. 2791, 2797 (1976) quoting from Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S. Ct. 279, 283 (1911). The "capable of repetition, yet evading review" doctrine applies when: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." Weinstein v. Bradford, 423 U.S. 147, 149, 96 S. Ct. 347, 349 (1975). The term "reasonable expectation" of recurrence does not require proof that repetition is "more probable than not." Honig v. Doe, supra, 484 U.S. at 318-319, n. 6, 108 S. Ct. at 601-02, n. 6. "Our concern in these cases, as in all others involving potentially moot claims, [is] whether the controversy [is] *capable* of repetition." Id. (emphasis added) and cases cited therein.

Given the scope of Beverly's operations nationwide, the underlying controversy plainly is "capable" of repetition. Indeed, this precise conflict may occur at the individual locations that are involved in this litigation when the collective bargaining agreements that cover those locations expire in 2001. Neither the Board, the Union nor Beverly has changed its views regarding Section 8(g) of the Act. Moreover, there is no assurance that the Board will have issued its administrative decision by the date the current

contract expires or that the Board's decision would be reviewed by a Court of Appeals before that date.[7]

The Court has recognized in past cases that labor issues involving strikes, collective bargaining agreements and management-labor issues are capable of repetition between the same parties when the next round of collective bargaining or voting occurs. Burlington Northern R. Company v. Brotherhood of Maintenance of Way Employees, 481 U.S. 429, 436 n. 4, 107 S. Ct. 1841, 1846 n. 4 (1987) (strike in connection with contract negotiations); Super Tire Engineering Co. v. McCorkle, supra, 416 U.S. at 125-127, 94 S. Ct. 1700-01 (strike following contract expiration);

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[7] If the Board's past history is any guide, it may even be fair to say that it is *likely* that Court of Appeals review of this administrative matter will not be finalized until well beyond the year 2001. As part of its strategy for justifying a nation-wide cease and desist order, the Board has stockpiled several years worth of charges and then issued a single complaint tying together unrelated, geographically separate facilities with diverse issues that are factually and legally complex. The result in Beverly California Corp., 310 NLRB 222 (1993) was a delay of more than three years between the administrative law judge's recommended decision and the Court of Appeals' subsequent denial of the Board's corporatewide order. In Beverly California Corp., 326 NLRB No. 29, there was a delay of more than four years between the administrative law judge's recommended decision and the Board's decision, and no briefing schedule has yet been set in the applicable Court of Appeals. Similarly, in Beverly California Corp., 326 NLRB No. 30, there was a delay of more than three years between the administrative law judge's recommended decision and the Board's decision, and that matter, too, has not been set for briefing in the applicable Court of Appeals.

International Organization of Masters, Mates & Pilots v. Brown, 498 U.S. 466, 473-74, 111 S. Ct. 880, 885-86 (1991) (distribution of campaign literature during union election).[8] "The burden of demonstrating mootness 'is a heavy one'", and this burden must be carried by the party asserting the applicability of the mootness doctrine. Los Angeles County v. Davis, 440 U.S. 625, 631, 99 S. Ct. 1379, 1383 (1979) quoting from U.S. v. W.T. Grant Co., 345 U.S. 629, 73 S. Ct. 894, 897 (1953). The Board cannot meet this burden with respect to the particular nursing homes that are a part of this case, and the Board even more clearly cannot meet this

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[8] The cases relied upon by the Board in its Opposition Brief are entirely inapposite. In Local No. 8-6, Oil, Chemical & Atomic Workers Intern. Union v. Missouri, 361 U.S. 363, 370, 80 S. Ct. 391, 396 (1960) the court's decision to decline review was guided by the fact that the Court was being called upon to decide a constitutional issue and, since the underlying order had expired, it could avoid the constitutional issue and vacate the judgment of the Supreme Court of Missouri without having to address the merits. In University of Texas v. Camenisch, 451 U.S. 390, 393, 101 S. Ct. 1830, 1833 (1981), the student in question had graduated by the time the action reached the Court; thus, no party contended that the matter was capable of repetition between the same parties, nor were there any collateral consequences associated with the underlying order. In McLeod v. General Elec. Co., 385 U.S. 533, 535, 87 S. Ct. 637, 639 (1967), the Court did *not* hold that the matter was moot. The Court remanded the matter to the district court so that the district court could have the first opportunity to consider the impact of a supervening event upon the appropriateness of injunctive relief. Id. The Court never reached the issues of whether the preliminary injunction had collateral consequences for the employer or whether the matter was capable of repetition, yet evading review.

burden with respect to the approximately 730 other locations at which this same issue between Beverly and the NLRB may recur.

Perhaps most importantly, the Board would not meet its burden even if it could show that this particular labor dispute between Beverly and the Union was not likely to recur. The "issue" presented in the Petition concerns the appropriate legal standard in 10(j) cases, and that issue is likely to recur no matter what future dispute causes the Board to initiate 10(j) proceeding against Beverly. Miller v. California Pacific Medical Center, supra, 19 F.3d at 454 (finding that a dispute over the proper legal standard in 10(j) proceedings was an issue capable of repetition between the same parties, yet evading review.)

The probability of recurrence is enhanced by the Board's special focus on Beverly and the Board's misperception that Beverly has a proclivity to violate the Act. This Court has recognized in the past that a "reasonable expectation" of a matter recurring is greater if an administrative agency has a past litigation history with the adverse party. S.E.C. v. Sloan, 436 U.S. 103, 109-110, 98 S. Ct. 1702, 1707 (1978) (finding no mootness since the business in question had been repeatedly targeted by the administrative agency).

IV. CONCLUSION

The Brief *Amici Curiae* of LPA and The American Trucking Association Inc. (p. 19) noted that the Board has vastly increased its use of Section 10(j) in the past four years, and enormous time is being spent by the courts debating the appropriate legal standard for review. In the present case, for example, it took nearly nine months for the District Court to make a decision regarding this "emergency" matter. In McLeod v. General Electric Co., 385 U.S. at 535, 87 S. Ct. at 639, the Court remanded the case to the district court because "[w]e do not think it appropriate . . . to decide at this time the proper construction of Section 10(j)." Now, however, the differing positions on this fundamental issue have been fully developed by the Courts of Appeals, who remain divided on what is, without a doubt, the most fundamental and critical issue in any injunction proceeding -- namely, the legal standard that serves as the basis for the court's decisionmaking process. Petitioner respectfully submits that this case is the proper vehicle for addressing this issue.

Respectfully submitted,

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Attorneys for Petitioner
January 30, 1999

APPENDIX

July 9, 1997

Re: BEVERLY ENTERPRISES, INC. et al.
Case 6-CA-27873

Hugh Reilly, Esquire
Chief Counsel for Labor and Employment
Beverly Enterprises, Inc.
5111 Rogers Avenue
Fort Smith, AR 72919

Dear Mr. Reilly:

As I have indicated in our recent telephone conversation, we are continuing our review of the Employer's compliance with Judge Smith's Order of April 4, 1997. This office is in the process of contacting the alleged discriminatees who have indicated that they have not yet been fully reinstated, and I hope to have a summary of the results of that effort in the near future.

One area of dispute which should be addressed at this point involves strikers who were reinstated prior to the issuance of Judge Smith's Order to positions or schedules different from their pre-strike status and who subsequently resigned their employment. The various Unions have provided this office with a list of such employees who have not received

subsequent offers of employment to their pre-strike positions following the issuance of Judge Smith's Order. Although we have not completed the process of contacting these individuals to determine the facts, I have listed the name of each individual under the respective home below in order to give you an opportunity to address this matter.

Caledonia Manor	**Carpenter Care Center**	**Mt. Lebanon Manor**
Charlotte Furman	Deborah Graham	Sandra Davis
	Karen Russell	Christina Fries
Beverly Manor-Monroeville	**Wm. Penn Nursing Center**	**Meyersdale Manor**
Patricia Northern	Denise Fultz	Edith Hutzell
Lod Stover	Robin Groce	
	Debbie Grubb	
	Josie Grubb	
	Glenn Kahley	
	Kimberly Kick	
	Janice Reed	
	Laurie Romig	
	Jeannette Solt	
	Tracy Steel	

Meadville Care Center	**Beverly Manor of Reading**	**Beverly Manor of Lancaster**
Barbara Ensworth	Alesia Drexel	Norma Flores
Shannon Mattis	Stephanie Mohring	

As you know, it is this Region's position that employees who were reinstated but not to their pre-strike position and who subsequently were forced to resign their employment are entitled to new offers of reinstatement in accordance with Judge Smith's Order. Please provide this office with your position regarding this issue.

In this regard, it is also requested that you supply this office with information as to the specific individuals named above so that we may determine whether factual issues exist. Therefore, it is requested that you provide us with a summary for each individual named herein which would include the individual's pre-strike position, including classification, department, assignment, schedule, status and wage rate; the same information regarding the terms and conditions of the pre-injunction offer of reinstatement including the date of actual reinstatement; the date and the circumstances surrounding the individual's resignation; and the same specifics relative to any reinstatement offers made to any of these individuals subsequent to Judge Smith's Order.

Of course, it may become necessary to examine the Employees records regarding these and other discriminatees. Please feel free to telephone me to discuss this matter at 412/395-6899. Your prompt attention to this request will be appreciated.

Very truly yours,

/s/ John P. O'Connell

John P. O'Connell

Compliance Supervisor

Letter from: National Labor Relations Board dated 7/9/97

Appendix 4

September 22, 1997

Re: BEVERLY ENTERPRISES, INC., et al.
Case 6-Ca-27873

Hugh Reilly, Esquire
Chief Counsel For Labor and Employment
Beverly Enterprises, Inc.
5111 Rogers Avenue
Fort Smith, AR 72919

Dear Mr. Reilly:

Since the issuance of Judge Smith's Order on April 4, 1997, this office has engaged in a comprehensive investigation with respect to the actions the Employer has undertaken in its efforts to comply with said Order. Initially, over 650 questionnaires were mailed to the affected strikers state-wide and, subsequently, this action was followed by another mass mailing of over 250 supplemental questionnaires to similar individuals in order to assist this office in determining whether Beverly Enterprises was in full compliance with said Order. A significant number of Regional office staff personnel then contacted a number of individuals who had indicated through their responses that they believed they had not been fully restored to the positions of employment they had held prior to the strike. Numerous additional allegations of non-compliance raised by the Charging Party Unions were

also investigated.

Moreover, on July 9, 1997, I sent to your attention written correspondence specifically identifying individuals, whose names had been provided to this office by the Charging Party Unions, as employees who allegedly had been reinstated to positions or schedules different from their pre-strike status and who subsequently resigned their employment. At that time, I had requested that you provide this office with information the company had in its possession on these individuals in an effort to expedite the investigation of all issues raised because of the large number of alleged matters indicating non-compliance. On July 14, 1997 you responded to my July 9 letter by informing me that you preferred to be apprised of the specifics of each individual's claim before you provided a response.

Based on this extensive investigation, I believe that there are two areas where it appears that the Employer may be in non-compliance with Judge Smith's Order by its failure to fully restore discriminatees to their pre-strike positions. The first area involves the same class of individuals that I had raised as a concern in my July 9 correspondence; these are employees who were reinstated to positions or schedules different from their pre-strike status and who subsequently resigned their employment, all of which occurred prior to the issuance of said Order. The second area of concern involves individuals

who have been reinstated and who continue to be employed but under conditions different than what they had experienced prior to the strike.

There are seven individuals in the first class and the specifics of their claim are listed below:

1. NORMA FLORES -- Beverly Manor Lancaster Prior to walkout work schedule consisted of 64 hours per pay period. Reinstated in 1996 to a reduced work schedule of 32 hours per pay period. Forced to resign due to inability to meet financial obligations on reduced income.

2. MELINDA EAKEN -- William Penn (Lewistown) Prior to walkout employed on full-time schedule consisting of 75 hours per pay period and assigned to 7:00 A.M. to 3:00 P.M. shift.

   Reinstated in September, 1996 to part-time position consisting of 32 hours per pay period. Granted medical leave of absence and returned to part-time position in February, 1997.

   Bid on full-time position on 3:00 P.M. to 11:00 P.M. shift.

   Forced to resign in March, 1997 due to child care problems related to employment on 3:00

P.M. to 11:00 P.M. shift.

3. BARBARA ENSWORTH -- Meadville Care Center

   Prior to walkout employed on full-time schedule consisting of 60 -- 75 hours per pay period.

   Reinstated in April, 1996 to part-time position consisting of 16 hours per pay period.

   Forced to resign in June, 1996 due to inability to meet financial obligations on reduced income and loss of insurance benefits.

4. VICKY WEIKAL -- Meadville Care Center

   Prior to walkout employed on full-time schedule in South Wing.

   Reinstated in September 1996 to full-time schedule in East Wing.

   Forced to resign in September, 1996 due to more onerous working conditions.

5. CHRISTINA NOVAK -- Mt. Lebanon Manor

   Prior to walkout employed on a part-time schedule. Reinstated in April, 1996 to a casual position.

   Forced to resign in October, 1996 due to uncertainty of work schedule and loss of insurance benefits.

6. DEBORAH GRAHAM -- Carpenter Care Center (Tunkhannock)

Prior to walkout employed on a full-time schedule. Reinstated in April, 1996 to part-time schedule. Forced to resign in July, 1996 due to inability to meet financial obligations on reduced income and loss of insurance benefits.

7. KAREN RUSSELL -- Carpenter Care Center (Tunkhannock)

Prior to walkout employed on a full-time schedule consisting of approximately 75 hours per pay period.

Reinstated in October, 1996, to part-time schedule with a reduced wage rate and alternate shift assignment.

Forced to resign in February, 1997 due to inability to meet financial obligations on reduced income.

There are ten individuals in the second class and the specifics of their claim are listed as follows:

1. MELISSA DANIELS -- Fayette Health Care

Prior to walkout assigned to 7:00 A.M. -- 3:00 P.M. shift on weekends.

Reinstated in May, 1997 to former job but assigned to other shifts on weekends. Replacement employees working 7:00 A.M. to 3:00 P.M. weekend shifts

2. ANDREA HRISCISCE -- Fayette Health Care

Prior to walkout regularly assigned to work five days per pay period. In addition, assigned additional hours as fill-in.

Returned to work after walkout. No longer regularly assigned five days per pay period or additional hours as fill-in.

Replacement employees working fill-in hours.

3. CONSTANCE KREELICH -- Fayette Health Care

Prior to walkout assigned to bid job in E-Wing.

Reinstated in April, 1997 to former job but assigned to B-Wing.

B-Wing assignment more onerous than E-Wing.

4. JOY KAHLEY -- William Penn Nursing Center (Lewistown)

Prior to walkout assigned as part-time employee in laundry.

Reinstated in May, 1997 as casual employee. Has worked one day since reinstatement. Replacement employees working in laundry.

5. SANDY KRATZER -- William Penn Nursing Center (Lewistown)

Prior to walkout employed on a part-time schedule consisting of 30 to 80 hours per pay

period.

Reinstated to casual position assigned reduced hours.

Replacement employees working in her classification.

6. TRACIE MCCARTLE -- William Penn Nursing Center (Lewistown)

For a significant period prior to walkout employed on a full-time schedule consisting of 60 to 75 hours per pay period.

Immediately prior to walkout assigned to a part-time schedule due to maternity complications.

Reinstated in May, 1997 to part-time hours.

No longer experiencing maternity problems.

7. SHARON DRAGOVICH -- Beverly Manor Reading

Prior to walkout employed as a part-time dietary aide assigned to same schedule for a five year period.

Reinstated to same number of hours but assigned to all different shifts.

The irregularity of current schedule causing hardship on family life.

8. IRENE SUMAN -- Beverly Manor Monroeville

Prior to strike walkout regularly scheduled to

work 50 hours per pay period in laundry but assigned additional hours in housekeeping. Reinstated to same number of hours in laundry but no longer assigned to additional hours in housekeeping.

Replacement employees being assigned housekeeping hours.

9. DAWN KISNER -- Carpenter Care Center (Tunkhannock)

Prior to walkout regularly assigned to Blue Wing.

Reinstated to Green Wing.

The change in wings requires her to work under more onerous conditions.

10. HARRY SICKLER -- Carpenter Care Center (Tunkhannock)

Prior to walkout regularly assigned to Gold Wing.

Reinstated to Blue Wing.

The change in Wings requires him to work under more onerous conditions.

Replacement employee assigned to Gold Wing.

Despite your unwillingness to provide your position regarding the status of the individuals named in my earlier correspondence, this office has been able to significantly

reduce the number of individuals in the first class whose status remain an issue.

It is requested that you respond to the claims of non-compliance no later than Monday, September 29, 1997 so that we may expeditiously bring to a close the issue of whether or noncompliance with Judge Smith's Order has been fully achieved. I welcome your response. It is the intention of this office to submit all unresolved issues of alleged non-compliance to our Division of Advice.

Your prompt and immediate attention to this matter is appreciated.

Very truly yours,
Very truly yours,
/s/ John P. O'Connell
John P. O'Connell
Compliance Supervisor

Letter from: National Labor Relations Board dated 9/22/97

October 14, 1997

Re: BEVERLY ENTERPRISES, INC., et al.
Case 6-CA-27873

Hugh Reilly, Esquire
Chief Counsel for Labor and Employment
Beverly Enterprises, Inc.
5111 Rogers Avenue
Fort Smith, AR 72919

Dear Mr. Reilly:

This is in reference to my letter dated September 22, 1997.

One individual who was inadvertently left off the list in the "second class" of individuals is Kimberly Milliken from the Franklin Care Center located in Waynesburg, PA. Her particulars are as follows:

Prior to walkout, assigned as part-time employee in the Laundry/Housekeeping Department. In addition, assigned additional hours as fill-in and normally worked 40 to 55 hours every two weeks.

Reinstated in June, 1996, as casual employee and assigned reduced hours.

Replacement employee Crystal Rajinovic continues to work hours in the Laundry/Housekeeping Department and assumes hours that Milliken normally would work.

Your prompt response to this claim of non-compliance will be appreciated.

Very truly yours,
/s/ John P. O'Connell
John P. O'Connell
Compliance Supervisor

Letter from: National Labor Relations Board dated 10/14/97

October 27, 1997

Re: BEVERLY ENTERPRISES, INC. et al.
Case 6-CA-27873

Hugh Reilly, Esquire
Chief Counsel for Labor and Employment
Beverly Enterprises Inc.
5111 Rogers Ave.
Fort Smith, AR 72919

Dear Mr. Reilly:

On October 14, 1997, I sent correspondence to your attention by both fax and regular mail with respect to the particulars regarding Kimberly Milliken who is employed by the Franklin Care Center located in Waynesburg, Pa. and was inadvertently left off the list in the "second class"of individuals, I had asked for your prompt response to this claim of non-compliance. To date I have not received your response to my inquiry.

I would appreciate it if you would provide me with your written response with respect to Ms. Milliken as soon as possible, but no later than Tuesday, October 28, 1997.

Your immediate attention to this matter will be appreciated.

Very truly yours,
/s/ John P. O'Connell
John P. O'Connell
Compliance Supervisor

Letter from: National Labor Relations Board dated 10/27/97

Appendix 17

November 12, 1997

Re: BEVERLY ENTERPRISES, INC., et al.
Case 6-CA-27873

Hugh Reilly, Esquire
Chief Counsel For Labor and Employment
Beverly Enterprises, Inc.
5111 Rogers Avenue
Fort Smith, AR 72919

Dear Mr. Reilly:

This office has completed its investigation and review of Beverly's efforts to fully comply with the reinstatement Order issued by Judge Smith on April 4, 1997. We believe there are five individuals who still have not been fully reinstated and, as a result, gross backpay continues to accrue on their behalf.

Discriminatees Barbara Ensworth (Meadville Care Center) and Karen Russell (Carpenter Care Center) were reinstated to positions or schedules that were different from what they had experienced prior to the April, 1996 walkout and voluntarily quit prior to Judge Smith's Order. It is the Region's position that these two individuals have never been offered full reinstatement. Thus, any backpay due them has not been tolled.

Discriminatees Andrea Hriscise, Julie McFadden and Twyla Ramage have been restored to their regular part-time hours at Fayette Health Care Center but have been consistently denied additional fill-in hours they had been assigned prior to the walkout. These fill-in hours are regularly assigned to two replacement housekeeping employees who remain employed at the Fayette facility. It is our position that these three individuals have not been fully reinstated and any fill-in hours being assigned to the two replacement employees would accrue as backpay due these individuals.

Although we believe these five individuals have not been fully restored in compliance with Judge Smith's Order, we do not intend to pursue these issues in a contempt proceeding before Judge Smith. However, we fully intend to litigate these matters in a future backpay proceeding should this Agency prevail in the underlying ULP litigation. Of course, nothing precludes Respondent from taking remedial actions at this time to toll accrual of additional backpay.

If you have any questions regarding this matter, please contact me at 412/395-6899.

Very truly yours,

/s/ John P. O'Connell

John P. O'Connell

Compliance Supervisor

Letter from: National Labor Relations Board dated 11/12/97